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A STUDENTS' TEXT

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ON

THE LAW OF PRINCIPAL AND AGENT

BY

SHERMAN STEELE

Lecturer on Agency in St. Louis University
School of Law

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TO
The Memory
OF
James J. Conway

PREFACE.

This book has been written with a view to its use as a class room text; and is addressed, therefore, primarily, to students.

Though no attempt has been made to reduce a treatment of the law of Agency to the simplicity of a primer, yet it is believed that the rules have been stated, and the principles discussed, with sufficient clearness and conciseness to bring them within grasp of the ordinarily intelligent student of law.

SHERMAN STEELE.

St. Louis, September 1, 1909.

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THE LAW OF AGENCY.

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§ 1. **Agency.** Agency is a legal relation, created by contract, whereby one party, called the agent, is authorized to represent the other party, called the principal, in business dealings with third persons, and is usually empowered to bring the principal into contractual relations with such persons.¹

¹ *Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763. Agency is the relation, created either by express or implied contract, or by law, whereby one party sui juris, called the

§ 2. **Form of contract.** The contract upon which the relation of principal and agent is founded may, with a few exceptions,² be either verbal or written;³ and, as in the case of other contracts, it may also be implied from acts of the parties.⁴ And so, a person's conduct may have been such as to estop him from denying the existence of the contract.⁵

principal, constituent, or employer, delegates the transaction of some lawful business with more or less discretionary power to another party, called the agent, attorney, proxy, or delegate, who undertakes to manage the affairs and render to him an account thereof. *State v. Hubbard*, 58 Kan. 797, 51 Pac. 290. The agent is the representative of the principal in the transaction of business embraced within his agency. Whatever he does lawfully in a transaction of that business is the act of the principal. *First Nat. Bank v. Linn County Nat. Bank*, 30 Ore. 296, 47 Pac. 614. An agent is a person duly authorized to act on behalf of another or whose unauthorized act has been duly ratified. *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907.

² Post § 46. Authority to execute a sealed instrument must be given under seal; and so, it is provided by statute in some of the states that authority to execute particular contracts, such as a contract for the sale or lease of land, must be in writing. *Banorjee v. Hovey*, 5 Mass. 11; *Shuetze v. Barley*, 40 Mo. 69; *Albertson v. Ashton*, 102 Ill. 50.

³ Post § 49. *Webb v. Browning*, 14 Mo. 354; *Riley v. Minor*, 29 Mo. 439; *Watson v. Sherman*, 84 Ill. 263; *Long v. Hartwell*, 34 N. J. Law, 116.

⁴ Post § 50. *Graff v. Callahan*, 158 Pa. St. 380, 27 Atl. 1009; *Sheanon v. Pacific Mut. Life Ins. Co.*, 83 Wis. 507, 53 N. W. 878.

⁵ To create an estoppel the conduct of the party need not consist of affirmative acts or words, but may consist of silence or negative omission to act when it was his duty to speak. *Diamond v. Manheim*, 61 Minn. 178, 63 N. W. 495. Hence if a person purposely or negligently permits another to hold himself out as his agent, he will not be heard to deny the existence of the agency. *Foss-Schneider Brewing Co. v. McLaughlin*, 5 Ind. App. 415, 31 N. E. 838; *Gibson v. Snow Hardware Co.*, 94 Ala. 346, 10 South. 304; *Cupples v. Whelan*, 61 Mo. 583.

§ 3. **Created by law.** In most of the definitions it is laid down that the relation of principal and agent is either founded on contract or "created by law." The anomaly of an "agency created by law" is conjured up to explain the liability of a husband or father for necessities furnished his wife or child, where he himself has refused to provide them.⁶ The liability in question, clearly, does not depend upon the existence of a relation of principal and agent between the parties;⁷ but is rather an obligation directly imposed by law out of motives of public policy. Without discussing the wisdom of this practice of attaching legal rules to divisions of law where accurately they do not belong, it may be stated that in this treatment of the subject we are not concerned with "agency created by law," but are to deal with a relation founded on agreement of the parties.

§ 4. **Master and servant.** The relation of master and servant is somewhat analogous to that of principal and agent. Different tests have been applied to distinguish them, such as the term of employment, the mode of compensation, the manner of rendering service and the like.⁸

⁶ In those cases where the law authorizes a wife to pledge her husband's credit even against his will, it creates a compulsory agency. *Benjamin v. Dockham*, 134 Mass. 418.

⁷ Thus, the husband is liable though the goods were furnished against his positive orders. He is liable, however, only for what the law deems necessities and only for a price that the law deems reasonable. In no sense would he be bound by virtue of his wife's agreement, as he would be were she his agent. The liability arises in the absence of any agreement by the wife and hence does not depend upon existence of a relation of principal and agent between husband and wife.

⁸ *Lang v. Simmons*, 64 Wis. 525, 25 N. W. 650; *Frank v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152; *Gravatt v. State*, 25 Ohio St. 162;

Practically, the agent is distinguished from the servant by the purpose of his employment.⁹ An agent acts for his principal in business dealings with third persons and brings the principal into legal relations with such persons.¹⁰ A servant is employed to perform acts upon or about things, and in his capacity of servant does not represent his master in business dealings with others, nor has he power to bind his master by contract. If authorized to do so, he that far ceases to be a servant and assumes the status of agent.¹¹

The term agent is sometimes used in statutes in a broader sense than here defined, so as to include any employee;—as where a person is forbidden to do an act personally or by agent. The sense in which the term is used in enactments of this character must be determined from a construction of the statute.¹²

§ 5. Classification. Different classifications of agents have been suggested, determined usually by the nature of their authority or the extent of their obligation. The most frequent classification is that of *universal*, *general* and *special* agents; and *del credere* and *non del credere* agents.

State v. Sarlis, 135 Ind. 195, 34 N. E. 1129. An agent has more or less discretion, while a servant acts under the master's control and direction; *McCroskey v. Hamilton*, 108 Ga. 640, 34 S. E. 111.

⁹ *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578.

¹⁰ *Wilson v. Mene-chas*, 40 Kan. 648, 20 Pac. 468; *Gardner v. Boston & M. R. Co.*, 70 Me. 181.

¹¹ *Kingan & Co. v. Silvers*, 13 Ind. App. 80, 37 N. E. 413. No power can be inferred from a relation of master and servant by which the latter can bind the former. *Moore v. Tickle*, 14 N. C. 244.

¹² *Hinderer v. State*, 38 Ala. 415; *Mitchell v. Georgia & A. Ry.* 111 Ga. 760, 36 S. E. 971; *Territory v. Maxwell*, 2 N. M. 250; 1 Wharton Crim. Law, § 1022.

§ 6. Universal, general and special agents.

(a) **Universal.** A universal agent would, necessarily, be one authorized to act for his principal in all possible business dealings with third persons, and empowered to bind his principal, without limit, by contract. A universal agency, like a mathematical point, has only theoretical existence. It is difficult to see how the creation of an actual universal agency would be legally possible; for no matter how broad the grant of authority, conditions might arise which were not in contemplation by the principal when he created the agency.¹³

(b) **General.** A general agent is one authorized to represent his principal generally in a particular line of business, such as the manager of a store, or an agent authorized generally to buy or sell goods for his principal.¹⁴ A person may have any number of general agents, and may combine a number of general agencies in a single agent.¹⁵

¹³ A universal agency may potentially exist but it must be of the rarest occurrence, and indeed "it is difficult," says Mr. Justice Story, "to conceive of the existence of such an agency, inasmuch as it would be to make an agent the complete master, not merely *dux facti*, but *dominus rerum*, the complete disposer of all the rights and property of the principal." *Wood v. McCain*, 7 Ala. 800; *Baldwin v. Tucker*, 112 Ky. 282, 65 S. W. 841.

¹⁴ *Lobdell v. Baker*, 1 Metc. (Mass.) 193; *De Turck v. Matz*, 180 Pa. St. 347, 36 Atl. 861; *Fishbaugh v. Spunaugle*, 118 Iowa, 337, 92 N. W. 58. A general agency exists when there is a delegation to do all acts connected with a particular business or employment. *Great Western Mining Co. v. Woodmas*, 12 Colo. 46, 20 Pac. 771. A general agent of an insurance company is one who is authorized to accept risks and settle terms of insurance, and to carry them into effect by issuing and renewing policies. *Walsh v. Hartford Fire Ins. Co.*, 9 Hun (N. Y.) 421.

¹⁵ A general authority to do an indefinite number of acts of a particular kind by no means constitutes a universal agency. *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125.

(c) **Special.** A special or particular agent is one authorized to act for his principal in a single or particular transaction, such as in the sale of a horse or a parcel of land.¹⁶

§ 7. **Del credere agent.** A *del credere* agent is one who, in consideration of increased compensation, guarantees the payment of any debt arising through his agency. The term is most generally used in reference to commission merchants who guarantee payment for the goods they sell on commission. A *non del credere* agent is, of course, one who makes no such guarantee.¹⁷

§ 8. **Particular designations.** There are a number of agents, whose duties are of a specific nature, to whom commonly recognized designations are given, such as attorneys *in fact* and *at law*, brokers, factors, auctioneers and the like.

(a) **Attorneys.** An agent authorized in writing to sign a deed, or other formal document, is frequently called an attorney *in fact*, and his written authority is termed a power of attorney. An *attorney in fact* is, of course, to be distinguished from an *attorney at law*, who, as such, merely represents his client in legal matters intrusted to his charge.¹⁸

¹⁶ First Nat. Bank v. Nelson, 38 Ga. 391; Scott v. McGrath, 7 Barb. 53; Cooley v. Perrine, 41 N. J. Law, 322; Davis v. Talbot, 137 Ind. 235, 36 N. E. 1098. A special agent is one authorized to do one or more specific acts, in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done. Pacific Biscuit Co. v. Dugger, 40 Ore. 362, 67 Pac. 32.

— ¹⁷ Loeb v. Hellman, 83 N. Y. 601; Ruffner v. Hewit, 7 W. Va. 585. A *del credere* agent is primarily liable to his principal for the price of the goods sold. Lewis v. Brehme, 33 Md. 412.

¹⁸ Attorney, in English law, signifies, in its widest sense, any substitute or agent appointed to act in the turn, stead or place of

(b) **Brokers.** A broker is an agent who brings parties together to bargain, or who negotiates for them business transactions, usually the purchase or sale of property not in his possession.¹⁹ He is employed "to make bargains and contracts between other persons in matters of trade, commerce and navigation for a compensation commonly called brokerage."²⁰ A person who sells real estate, stocks or bonds on commission is a broker.

(c) **Factors.** The term factor is the legal equivalent of the business term commission merchant.²¹ A factor differs from a broker in that he has possession of the goods to be sold and usually sells them in his own name,²² frequently guaranteeing payment; in which event he is said to sell upon *del credere* commission.

(d) **Auctioneer.** An auctioneer is an agent who sells property of his principal at public sale or auction. He differs from a broker in that his sales are public. Though

another. In *re Ricker*, 66 N. H. 207, 29 Atl. 559. An attorney-at-law is merely an agent of a party, and special agent at that, in the sense that his authority extends only to the particular matter in which he is employed. *Douglass v. Folsom*, 21 Nev. 441, 33 Pac. 660.

—¹⁹ *Higgins v. Moore*, 34 N. Y. 417; *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391; *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348. A broker is a mere negotiator between other parties, and does not act in his own name, but in the name of those who employ him. *Henderson v. State*, 50 Ind. 234.

²⁰ *Story on Agency*, § 22.

²¹ *Mechem's Agency*, § 14; *Thompson v. Woodruff*, 47 Tenn. 401; *Duguid v. Edwards*, 50 Barb. (N. Y.) 299, 298

²² In *re Rabenau*, 118 Fed. 471; *State v. Thompson*, 120 Mo. 12, 25 S. W. 346; *Delafield v. Smith*, 101 Wis. 664, 78 N. W. 170. A factor is a commercial agent transacting the mercantile affairs of other men in consideration of a fixed salary or commission, and principally, though not exclusively, in the buying and selling of goods. *Lawrence v. Storington Bank*, 6 Conn. 521.

primarily agent of the seller, an auctioneer becomes also the agent of the buyer when he accepts the latter's bid and enters his name upon the memorandum of sale.²³

§ 9. Partners. The formation of a partnership creates a qualified relation of agency between the partners. In the absence of express restrictions, each partner is deemed the agent of all in the transaction of such affairs as come within the scope of the partnership business.²⁴

§ 10. Other forms of agency. Certain officers of ships, such as the master; and particular officials of corporations, such as the cashier of a bank, are agents, whose functions are more or less familiar and whose duties, to a large extent, are defined by custom.²⁵

§ 11. Legal recognition. The law gives recognition to all the foregoing familiar forms of agency; and while it is the rule that no presumptions are indulged as to the nature or extent of an agent's authority, but that the same must be established by evidence; yet, where the duties of a particular agent are well defined by custom, it will be assumed, in the absence of express restrictions, that such an agent's

²³ *White v. Dahlquist Mfg. Co.*, 179 Mass. 427, 60 N. E. 791; *Thomas v. Kerr*, 3 Bush. (Ky.) 619; *Randall v. Lautenberger*, 16 R. I. 159, 13 Atl. 100.

²⁴ *Person v. Carter*, 7 N. C. 321; *Summerlot v. Hamilton*, 121 Ind. 87, 22 N. E. 973. A partner may buy land for the firm if it is needed for the firm business. *Davis v. Cook*, 14 Nev. 265; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529.

²⁵ *Porter v. Herman*, 8 Cal. 619; *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *Martin v. Webb*, 110 U. S. 7. The term agent is one of wide application and includes a great many classes of persons to which distinctive appellations are given, as factors, brokers, attorneys, cashiers, clerks, consignees, etc. *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123.

authority, in any particular case, extends to the performance of those functions for which, according to the usages of business, he is ordinarily employed.²⁸

²⁸ Post, Chap. IX. *Gray v. Farmers Nat. Bank*, 81 Md. 631, 32 Atl. 518; *Abbot v. Jack*, 136 Cal. 510, 69 Pac. 257. A cashier of a bank is held out to the public as having authority to act according to the general usage, practice and course of business conducted by such institutions, and his acts done in the scope of such usage, practice and course of business will, in general, bind the bank in favor of third persons possessing no other knowledge. Such an officer is, *virtute officii*, intrusted with the notes, securities, and other evidence of the bank, and is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of authority vested by such usage, practice, and course of business. *Case v. Citizens' Bank*, 100 U. S. 446.

CHAPTER II.

CAPACITY OF PARTIES.

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§ 12. Who may be principal. The relation of principal and agent, as we have seen, is founded on contract, and an agent usually brings his principal into contractual relations with others. To appoint an agent, therefore, or to act by agent, a person must be competent to contract. Those persons whom the law declares incapable of entering into contracts generally, can not enter into the contract of agency, or contract through an agent with third parties.¹ Stated conversely, the rule is that any one legally competent to con-

¹ *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Armitage v. Widoe*, 36 Mich. 124. As to competency in general see *Lawson on Contracts*, Chap. V.

tract may appoint an agent, and, with a few exceptions,² may do through an agent any act which he is capable of doing in person,³ or make any contract into which he is competent personally to enter.⁴ Broadly speaking, any person competent to act in his own behalf may act by agent; and anything which a person may do himself he may do by agent.⁵

§ 13. Joint principals. Any number of persons, individually competent to contract, may unite in the appointment of an agent to represent them in business dealings with others or to bind them by contract with third parties.⁶ Where several persons have common interests, such as joint ownership of property, it may frequently occur that they will join in the appointment of one of their own number, or of a stranger, as agent; or they may authorize one of their own number to make the appointment in behalf of all. In either event the acts of the agent, within the scope of his

² Acts essentially of a personal nature and powers conferred because of personal qualification can not be delegated; and, so, where a statutory duty or authority is required to be personally executed, it, of course, can not be delegated. *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Brown v. Railway Passenger Assur. Co.*, 45 Mo. 221; *Finnegan v. Lucy*, 157 Mass. 439, 32 N. E. 656; Post, Chap. III.

³ Broom's Legal Maxims: *Qui facit per alium facit per se*. *Combes' Case*, 9 Co. Rep. 75. An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give personal attention. Cal. Code, § 2304.

⁴ *Lea v. Bringler*, 19 La. Ann. 197. Capacity to contract through an agent, is coextensive with the capacity of the principal to contract.

⁵ *Ferguson v. Morris*, 67 Ala. 389.

⁶ *Holladay v. Dally*, 19 Wall. (U. S.) 606; *Reiman v. Hamilton*, 111 Mass. 245.

authority, become the acts of all the principals.⁷ The fact, however, of the existence in several persons of a common interest does not imply authority in one to represent the others, nor to appoint an agent in behalf of all.⁸ The assent of all the principals is required. Thus, the appointment of an agent by one of several joint tenants will in no way bind the others unless they give their assent either at the time or subsequently by ratification.⁹

§ 14. Partnership. The formation of a partnership, as we have seen, creates a relation of agency between the partners, whereby each becomes the agent of all in the transaction of partnership business.¹⁰ In the absence of express restriction, therefore, the existence of a partnership implies authority in each member of the firm to appoint such agents as may reasonably be needed to carry on the partnership business; and the appointment by one partner, within the limits indicated, is deemed an appointment by all.¹¹

⁷ *Graham v. Cummings*, 208 Pa. St. 516, 57 Atl. 943; *Noe v. Christie*, 51 N. Y. 270; *Chouteau v. Goddins*, 39 Mo. 229, 90 Am. Dec. 462.

⁸ *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Sims v. Dame*, 113 Ind. 127, 15 N. E. 217; *Keay v. Fenwick*, 1 C. P. Div. 745 (Eng.)

⁹ *Sewell v. Holland*, 61 Ga. 608; *Murray v. Haverty*, 70 Ill. 318; *Tipping v. Robbins*, 64 Wis. 546, 25 N. W. 713; *Richey v. Brown*, 58 Mich. 435, 25 N. W. 386.

¹⁰ *Story on Partnership*, § 1; *Deakin v. Underwood*, 37 Minn. 98, 33 N. W. 318.

¹¹ *Paton v. Baker*, 62 Iowa, 704; *Harvey v. McAdams*, 32 Mich. 472; *Carley v. Jenkins*, 46 Vt. 721; *Coons v. Renick*, 11 Tex. 134, 60 Am. Dec. 230. To appoint an agent for a purpose not within the scope of the partnership business, the concurrence of all the partners would be necessary. *Burgan v. Lyell*, 2 Mich. 102, 55 Am. Dec. 53; *Durgin v. Somers*, 117 Mass. 55.

§ 15. **Voluntary associations, clubs, societies.** Voluntary associations, such as clubs, religious or charitable societies and the like, when not incorporated, do not possess a distinct legal entity, like a corporation, which is competent to appoint an agent or to enter into contracts.¹² Neither is an association of this character a partnership; and consequently members are not bound by one another's acts or contracts as in the case of partners.¹³ Contracts may be made in the name of members of the association, but only those are bound by such a contract who have expressly or impliedly given their assent to the same.¹⁴ Hence no member can be made liable for debts incurred, or be bound by any contract entered into, on behalf of such an association by its officers, or other members, unless a relation of principal and agent can be established between the member sought to be bound and those who, purporting to represent the association, incurred the debt or entered into the contract.¹⁵ The existence of such a relation will not be inferred from the fact of membership, as in the case of partners; but actual delegation of authority must be established

¹² *Westbrook v. Griffin*, 132 Iowa, 185, 109 N. W. 608; *Pearson v. Anderberg*, 28 Utah, 495, 80 Pac. 307; *Liggett v. Ladd*, 17 Ore. 89, 21 Pac. 133. A voluntary association can not be a devisee by its association name.—*White v. Howard*, 46 N. Y. 144. Or hold real estate. *Goesele v. Bimeler*, 14 How. (U. S.) 589. Such an association must sue and be sued in the names of the individual members, unless otherwise provided by statute. *Gulld v. Allen*, 28 R. I. 430, 67 Atl. 855.

¹³ *Burt v. Lathrop*, 52 Mich. 106, 17 N. W. 716; *Davison v. Holden*, 55 Conn. 103, 10 Atl. 515.

¹⁴ *Ash v. Gui*, 97 Pa. St. 493, 39 Am. Rep. 818; *Newell v. Borden*, 128 Mass. 31; *Wilcox v. Arnold*, 162 Mass. 577, 39 N. E. 414.

¹⁵ *Lewis v. Tilton*, 64 Iowa, 220, 19 N. W. 911; *Castner v. Rinne*, 31 Colo. 256, 72 Pac. 1052; *Cheney v. Goodwin*, 88 Me. 563, 34 Atl. 420; *Hornberger v. Orchard*, 39 Neb. 639, 58 N. W. 425.

in order to create liability.¹⁶ Thus where a number of persons, members of a Masonic lodge, were sought to be held liable upon a certificate of indebtedness, executed by the master and wardens, for a debt incurred in the erection of a lodge building, but there was no evidence that they had participated in the enterprise, or in any way acquiesced in the creation of the obligation, it was held that they were not bound by the same.¹⁷ And so, where at a meeting of an unincorporated association, organized for the purpose of stimulating interest in the raising of poultry, the board of directors was authorized to give a public exhibition, and a premium list was adopted by a vote of the society, it was held, in an action, subsequently brought, to compel defendants, as members, to contribute their share of the expense of the exhibition, that mere membership would not create liability, and that only those members who joined in the vote to hold the exhibition, or in some way assented to be bound thereby, could be held liable for the expense incurred.¹⁸

This actual assent, however, to be bound by majority action, or by contracts made by officers or committees, need not be expressly given but may be implied from the circumstances of the case or the acts of the parties.¹⁹ Thus, if the constitution or by-laws of an association should provide that members are bound by a majority vote or that

¹⁶ *McCabe v. Goodfellow*, 133 N. Y. 89, 30 N. E. 728; *-Lafond v. Deems*, 81 N. Y. 507; *Rice v. Peninsular Club*, 52 Mich. 87, 17 N. W. 708; *Flemyng v. Hector*, 2 M. & W. 172.

¹⁷ *Ash v. Gul*, 97 Pa. St. 493, 39 Am. Rep. 818.

¹⁸ *Ray v. Powers*, 134 Mass. 22. The rule was held to be the same where an exhibitor sued for a premium that had been awarded him. *Volger v. Ray*, 131 Mass. 439.

¹⁹ *Davison v. Holden*, 55 Conn. 103, 10 Atl. 515; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Todd v. Emly*, 7 M. & W. (Eng.) 427.

particular officers shall have authority, within prescribed limits, to bind the association by contract, acceptance of membership therein, in the face of such provisions in its constitution or laws, indicates a willingness to be bound thereby. When a person, therefore, joins an association, which is subject to laws or regulations of the character described, he impliedly consents to be governed by their provisions, and thus confers, in advance, authority upon proper officers or committees, under prescribed circumstances, to bind him by such contracts as come reasonably within the contemplation of the rules or regulations of the society.²⁰ So, in the absence of such provisions, an implication of authority may arise, as in other cases of agency, from the conduct of the parties.²¹ Thus certain members of a committee, having in charge a public dinner, were held liable for a share of the expense of the same, notwithstanding that they voted against it; their assent, in this case, being inferred from the fact that after the vote was taken they remained at the meeting and acquiesced by their silence in the ordering of the dinner.²² And so, there may be cases where the object for which an association is organized is so clear and the acts done so essential to the furtherance of that object, that all members will be presumptively bound without evidence of express assent.²³

²⁰ *Kalbitzer v. Goodhue*, 52 W. Va. 435, 44 S. E. 264; *Bennett v. Lathrop*, 71 Conn. 613, 42 Atl. 634; *Devoss v. Gray*, 22 Ohio St. 169. One can not become a member of a voluntary unincorporated association unless he signs or in some way assents to the constitution and by-laws. *Konta v. St. Louis Stock Exchange*, 189 Mo. 26, 87 S. W. 969.

²¹ *Wilcox v. Arnold*, 162 Mass. 577, 39 N. E. 414; *Heath v. Goslin*, 80 Mo. 310.

²² *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540; *Wilcox v. Arnold*, *supra*.

²³ Persons who organize as a campaign committee on the eve

§ 16. Who may not be principal. (a) In general.

Those persons whom the law declares incompetent to enter into contracts can not, as we have seen, appoint agents or contract through agents. This incompetency may arise from natural incapacity, as in the case of insane or drunken persons; or it may arise—to use the stock phrase—from operation of law, as in the case of aliens, married women and infants.²⁴

§ 17. Insane persons. The law is generally declared to be that an insane person can not appoint an agent, nor, even after regaining sanity, ratify a contract made in his behalf by one who assumed to act as agent.²⁵ This rule, apparently, is founded upon the doctrine that contracts of insane persons are void;²⁶ and may be cited as an example of the failure of one branch of the law to keep pace, in a forward advance, with another. It is the modern law that the contract of an insane person, unless he is under legal guardianship,²⁷ is voidable, at his option, but not void.²⁸

of an election may be supposed to know that their associates, in the name of the committee, will incur certain obvious expenses in giving public notice of political meetings, and thus they sanction such outlay by the very fact of their organization. *Richmond v. Judy*, 6 Mo. App. 465.

²⁴ Bishop on Contracts, Chap. XXXIII, et. seq.

²⁵ *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Marvin v. Inglis*, 39 How. Prac. 329; *Elias v. Enterprise Building & Loan Ass'n*, 46 N. C. 188, 24 S. E. 102; *McClun v. McClun*, 176 Ill. 376, 52 N. E. 928. A deaf mute who does not understand any matter of business, can not manage his own affairs, and consequently can not appoint an agent. In *re Perrine*, 41 N. J. Eq. 409, 5 Atl. 579. A person can ratify an act only where he would have been capable of authorizing it. Post § 56.

²⁶ *Seavers v. Phelps*, 11 Pick. (Mass.) 304; *Van Deusen v. Sweet*, 51 N. Y. 378.

²⁷ *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235; *Burnham v. Kid-*

Hence it would seem logically to follow that the appointment of an agent by an insane person, not under guardianship, is merely voidable, and that any contract made by such agent, in behalf of his principal, could be ratified by the latter upon regaining sanity. Such, however, as we have indicated, is not generally held to be the law; though in at least one modern case the doctrine has been squarely adopted, and in time will doubtless be accepted as the rule.²⁹

It is a rule of the law of contracts that where an insane person enters into an agreement with another party who has no knowledge of the existence of the insanity, but deals fairly and in good faith, the contract will be deemed valid, if the same has been executed in whole or in part and the parties can not be restored to *statu quo*.³⁰ This rule would seem still to be applicable though the contract, in question,

well, 113 Ill. 425; *Lynch v. Dodge*, 130 Mass. 458; *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386. It has been held that this absolute disability extends only to contracts made in the state where the guardian was appointed. *Gates v. Bingham*, 49 Conn. 275; *Contra, American Trust Co. v. Boone*, 102 Ga. 202.

²⁹ *Bishop on Contracts*, Chap. XXXV; *Person v. Warren*, 14 Barb (N. Y.) 488; *Fay v. Burdett*, 81 Ind. 433, 42 Am. Rep. 142. To avoid a contract, free from fraud or undue influence, on the ground of insanity of a party thereto, it must appear that by reason of his insanity, he had no reasonable understanding of the nature and terms of the contract. *Swartwood v. Chance*, 131 Iowa, 714, 109 N. W. 297.

³⁰ *Williams v. Sapieha*, 94 Tex. 430, 61 S. W. 115; Post § 56.

³⁰ *Alexander v. Haskins*, 68 Iowa, 73; *Hosler v. Beard*, 54 Ohio St. 398, 56 Am. St. Rep. 720; *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167; *Studebaker v. Faylor*, 170 Ind. 498, 83 N. E. 747; *Smith's Committee v. Forsythe*, 28 Ky. Law Rep. 1034, 90 S. W. 1075. It has been held, however, that the defense of insanity may be interposed to an action on a contract without restoring what the insane person has received, if it can not be restored in specie. *Rea v. Bishop*, 41 Neb. 202, 59 N. W. 555.

was made through an agent.³¹ So, the contract of an insane person made during a lucid interval is binding upon him;³² and this rule would undoubtedly apply to contracts made through an agent.³³

§ 18. **Drunken persons.** The contract of a person so intoxicated as to be incapable of understanding his act, is voidable; but may be ratified by the drunkard when he becomes sober.³⁴ There seems no reason why this rule should not apply to contracts made through an agent.³⁵

§ 19. **Aliens.** In the United States, aliens have full capacity to contract,³⁶ except during war between their country and this.³⁷ Hence alien friends may appoint agents and contract through agents.³⁸

³¹ *Davis v. Lane*, 10 N. H. 156; *Mathiessen, etc. Refining Co. v. McMahon*, 38 N. J. Law, 536.

³² *Ricketts v. Jolliff*, 62 Miss. 449; *In re Gangwere*, 14 Pa. St. 417, 53 Am. Dec. 554; *Lilly v. Waggoner*, 27 Ill. 395. A lucid interval is such a full return of the mind to sanity as places the party in the possession of the powers of mind, enabling him to understand and transact his affairs as usual. *Elkin v. McCracken*, 22 Leg. Int. 405.

³³ *Mechem on Agency*, § 43; *Daily Telegraph Co. v. McLaughlin*, 73 Law J. P. C. (Eng.) 95.

³⁴ *Schramm v. O'Connor*, 38 Ill. 539; *Bush v. Breinig*, 113 Pa. St. 319, 57 Am. Rep. 469; *Lyon v. Phillips*, 106 Pa. St. 57; *Lawson on Contracts*, § 163.

³⁵ *Tiffany on Agency*, p. 101.

³⁶ Aliens are prohibited by statute in some states from acquiring or holding land; otherwise the power of an alien friend to contract is co-extensive with that of a citizen. *Taylor v. Carpenter*, 3 Story, 458; *Roberts v. Knights*, 7 Allen (Mass.) 449; *Crashley v. Press Pub. Co.*, 179 N. Y. 27, 71 N. E. 258.

³⁷ *Shotwell v. Ellis*, 42 Miss. 439; *Zacharie v. Godfrey*, 50 Ill. 186, 99 Am. Dec. 506. A contract made before war, is suspended during the continuance thereof, but on the return of peace all rights thereunder revive. *Ware v. Hylton*, 3 Dall. 199.

³⁸ *United States v. Grossmayer*, 9 Wall. (U. S.) 72; *New York*

§ 20. **Married women.** At common law, married women were incompetent to contract and hence could not appoint agents.³⁹ Married Woman Acts have removed this disability, and today a married woman has usually the same capacity to contract as a *feme sole*, and hence may appoint an agent or contract through an agent.⁴⁰

§ 21. **Infants.** The law governing the right of an infant to appoint an agent, or to act through an agent, presents the same inconsistency as that which characterizes the rule applicable to the appointment of agents by insane persons. In face of the general doctrine that contracts of an infant are merely voidable and susceptible of ratification,⁴¹ the law is generally declared to be that an infant can not appoint an agent, nor, after gaining majority, ratify a contract made in his behalf by one who undertook to act as his agent.⁴²

Life Ins. Co. v. Davis, 95 U. S. 425. War usually terminates an agency. Post § 77.

³⁹ *Norris v. Lantz*, 18 Md. 260; *Rogers v. Higgins*, 48 Ill. 211; *Farrar v. Bessey*, 24 Vt. 89; *Caldwell v. Walters*, 18 Pa. St. 79, 55 Am Dec. 592.

⁴⁰ *Bishop on Contracts*, § 951; *Hoene v. Pollak*, 118 Ala. 617, 24 South. 349; *Lavassar v. Washburne*, 50 Wis. 200, 6 N. W. 516; *McLaren v. Hall*, 26 Iowa, 297; *Baum v. Mullen*, 47 N. Y. 577; *Williams v. Paine*, 169 U. S. 55. The extent of a married woman's capacity to contract will, of course, be determined by the provisions of the enabling statute, which creates the power. — *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38.

⁴¹ *Bishop on Contracts*, § 924; *Bozeman v. Browning*, 31 Ark. 364; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54, 24 S. W. 428; *Watson v. Ruderman*, 79 Conn. 687, 66 Atl. 515; *Damron v. Ratliff*, 30 Ky. Law Rep. 67, 97 S. W. 401. A deed of an infant is not void, but only voidable on his disaffirmance. *Robison v. Allison*, 192 Mo. 366, 91 S. W. 115.

⁴² *Armitage v. Widoe*, 36 Mich. 124; *Semple v. Morrison*, 23 Ky. 298; *Sawyer v. Northan*, 112 N. C. 261, 16 S. E. 1023; *Holdon v.*

The reason for the rule has been stated as follows: "The constituting of an attorney by one whose acts are in their nature voidable, is repugnant and impossible, for it is imparting a right which the principal does not possess,—that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, the power of attorney is not operative according to its terms; if they are binding upon the infant, then he has done through the agency of another what he could not have done directly—binding acts. The fundamental principle of law in regard to infants requires that the infant should have the power of affirming such acts done by the attorney as he chooses, and avoiding others, at his option; but this involves an immediate contradiction, for to possess the right of availing himself of any of the acts, he must ratify the power of attorney, and if he ratifies the power, all that was done under it is confirmed. If he affirms part of a transaction, he at once confirms the power, and thereby, against his intention, affirms the whole transaction."⁴³ This reasoning is ingenious, though probably too refined. There seems no practical reason why an infant could not ratify distinct acts done by his agent without necessarily affirming the entire agency, or binding himself by all acts done thereunder.

The rule, in any event, has not met with unqualified approval by the courts. Many decisions confine its application to powers of attorney to sell land or to confess judgment;⁴⁴ and in at least two modern cases the entire doc-

Curry, 85 Wis. 504, 55 N. W. 965. Infants can not have an attorney in fact since they have no capacity to execute a valid power of attorney. Glass v. Glass, 76 Ala. 368; Post § 56.

⁴³ 1 Am. Lead. Cas. (5th ed.) 247.

⁴⁴ Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Fairbanks

trine has been repudiated. "On principle," says the court in a Minnesota case, "we think the power of attorney of an infant, and the acts and contracts made under it, should be considered voidable in the same manner as his personal acts and contracts are considered voidable."⁴⁵ This seems more in accord with modern reasoning, and doubtless will be followed; so, it may be surmised, that at no great future date the law will be that an infant may make voidable appointment of an agent, and, upon attaining majority, may affirm the agency and ratify contracts made in his behalf by the agent.⁴⁶

§ 22. **Who may be agents.** Since the relation of agency is founded on contract, it would seem, at first blush, that only those persons could be agents who are capable of being principals, namely such persons only who, in law, are competent to contract. The primary purpose of an agency, however, is to bring the principal into contractual relations with third persons; and this purpose may be accomplished through the mediumship of an agent who himself is incompetent to contract.⁴⁷ Where a person, having capacity to

v. Snow, 145 Mass. 153, 13 N. E. 596; *Towle v. Drésser*, 73 Me. 252; *Hastings v. Dollarhide*, 24 Cal. 195. Thus where an infant authorized an agent to indorse a note it was held that the indorsement was merely voidable and could be ratified by the infant. *Whitney v. Dutch*, *supra*.

⁴⁵ *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697; *Ferguson v. Houston, etc., R. Co.*, 73 Tex. 344, 11 S. W. 347.

⁴⁶ *Hardy v. Waters*, 38 Me. 450; *Coursolle v. Weyerhauser*, *supra*; *Williams v. Sapieha*, 94 Tex. 430, 61 S. W. 115.

⁴⁷ *Lang v. Waters*, 47 Ala. 624; *Brown v. Hartford Ins. Co.*, 117 Mass. 479; *Stall v. Meek*, 70 Pa. St. 181. The execution of a naked authority can be attended with no manner of prejudice to persons under incapacities or disabilities nor to any other person who by law may claim any interest of such disabled person after death. *Bacon's Abridgement*.

contract, appoints an agent, who does not possess this capacity, the contract of agency between them is imperfect, and the duties and obligations usually created by such a contract, would not be binding upon the agent.⁴⁸ Thus the principal could not maintain an action for failure to obey instructions;⁴⁹ though he could sue the agent in tort.⁵⁰ So, where an agent is not himself competent to contract, no contractual obligation could be created between him and third parties with whom he deals; as is sometimes the case with agents legally competent.⁵¹ So far, however, as the principal and third parties are concerned, it matters not that the agent through whom they deal does not himself possess power to contract.⁵²

§ 23. **Infants, insane persons and married women.** It is sometimes stated as the rule that an infant above the age of seven may act as agent;⁵³ but there seems no reason for fixing an arbitrary age limit, as a child of five might be as

⁴⁸ So far as the contract of agency itself is concerned, the agent contracts in his own behalf with the principal and hence will not be bound by its terms if he does not possess contractual capacity; such a contract, like any other entered into by an infant would be voidable. *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580.

⁴⁹ *Vasse v. Smith*, 6 Cranch. (U. S.) 226; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Studwell v. Shapter*, 54 N. Y. 249.

⁵⁰ It is, of course, the general doctrine that infants are liable for their torts. *Cooley on Torts*, Chap. IV; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671.

⁵¹ *Caswell v. Parker*, 96 Me. 39, 51 Atl. 238; *Post*, Chap. XIII.

⁵² A slave, who is, *homo non civilis*, a person who is little above a brute in legal rights, may act as agent for his owner or hirer. *Lyon v. Kent*, 45 Ala. 656.

⁵³ *Lyon v. Kent*, 45 Ala. 656; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747.

competent, actually, to perform some of the simpler duties of an agent, such as delivering a message or a deed, as would be a child of seven.⁵⁴ As indicated in the preceding section, the contract of agency would not be binding upon the infant agent, nor could any contractual obligations arise between him and third parties with whom he deals.⁵⁵

The rule as to infants would seem applicable to insane persons; on principle, there is no reason against their performing some simple duties of an agent. But Story says that "an idiot, lunatic or person otherwise non compos mentis can not do any act, as an agent or attorney, binding upon the principal."⁵⁶

At common law, a married woman, though incompetent to contract, could act as agent either for her husband, or for another, in dealings with third persons.⁵⁷

§ 24. Corporations and partnerships. Within the scope of its corporate powers, a corporation may act as agent for other corporations or individuals.⁵⁸ So a partnership may be appointed agent; and in the absence of express restriction, either partner may execute the authority, in accord-

⁵⁴ It would seem that neither the principal, who chose the infant agent, nor the third person, who voluntarily dealt with him, would be in a position to afterwards object to his incapacity. *Cameron v. Ward*, 22 Ga. 168; *Freeman v. Great Western Ry. Co.*, 38 L. T. Rep. 851.

⁵⁵ *Vasse v. Smith*, 6 Cranch. (U. S.) 226; *Widrig v. Taggart*, 51 Mich. 103, 16 N. W. 251.

⁵⁶ Story on Agency, § 7; See, *Cobb v. Judge*, 43 Mich. 289, 5 N. W. 309.

⁵⁷ *Heney v. Sargent*, 54 Cal. 396; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Edgerton v. Thomas*, 9 N. Y. 40; *Butler v. Price*, 110 Mass. 97.

⁵⁸ *McWilliams v. Detroit Mills Co.*, 31 Mich. 275.

ance with the rule that within the limits of partnership business, the act of one partner is the act of all.⁵⁹

§ 25. **Persons adversely interested.** An agent owes to his principal disinterested service, which must be rendered in absolute good faith;⁶⁰ and it would, consequently, disqualify one to act as agent for another if his interests were in the slightest degree antagonistic to those of his principal.⁶¹ An agent, therefore, can not act for both parties to a transaction without their knowledge and consent;⁶² nor can an agent himself become a party to a transaction in which he acts as representative of another; except with the assent of the latter.⁶³ Thus, where the same person wrong-

⁵⁹ *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827, 33 N. W. 318; *Eggleston v. Boardman*, 37 Mich. 14; *Lemke v. Faustman*, 124 Ill. App. 624.

⁶⁰ *Condit v. Blakewell*, 22 N. J. Eq. 481; *Williams v. Moore-Gaunt Co.*, 3 Ga. App. 756, 60 S. E. 372; *Thorne v. Brown*, 63 W. Va. 603, 60 S. E. 614; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594.

⁶¹ *Knabe v. Ternot*, 16 La. Ann. 13; *Tynes v. Grimstead*, 1 Tenn. Ch. 508; *Prichard v. Abbott*, 104 Md. 560, 65 Atl. 421; *Calmon v. Saraille*, 142 Cal. 638, 76 Pac. 486. The adverse interest which precludes an agent from acting for his principal must be in the subject matter of the agency. *Gaty v. Sack*, 19 Mo. App. 470.

⁶² *Schwartz v. Yearly*, 31 Md. 270; *Young v. Hughes*, 32 N. J. Eq. 372; *Robison v. Jarvis*, 25 Mo. App. 421. The maxim "no man shall serve two masters," does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction when their interests do not conflict, and where loyalty to one is not a breach of duty to the other. *Todd v. German American Ins. Co.*, 2 Ga. App. 789, 59 S. E. 94.

⁶³ *Swindell v. Latham*, 145 N. C. 144, 58 S. E. 1010; *Pegram v. Charlotte, etc., Ry. Co.*, 84 N. C. 696, 37 Am. Rep. 639; *Dorrah v. Hill*, 73 Miss. 787, 19 South. 961; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203. An agent will not be allowed to deal in his own behalf with his principal with reference to the subject matter of the agency unless he makes full and honest disclosure of the

fully acts as agent for both buyer and seller, either may repudiate the sale;⁶⁴ and where an agent employed to sell property sells to himself, or one authorized to buy property, buys from himself, the transaction will not be binding upon the principal.⁶⁵

§ 26. **Unlicensed agents.** Where it is required by statute that a person secure a license as a condition precedent to engaging in a particular business, failure to comply therewith will preclude recovering of compensation for services rendered; though it will not invalidate a contract made by such person in behalf of his principal with third parties.⁶⁶ Thus where a real estate broker did not equip himself with the required license to engage in his occupation, he could not enforce a contract for commission on sales.⁶⁷ And so, a party who represented himself to be a duly authorized attorney, and, as such, was employed by another, but who, as a matter of fact, had not been licensed to practice law, could not recover for services rendered.⁶⁸

truth of the transaction. *Curry v. King*, 6 Cal. App. 568, 92 Pac. 662.

⁶⁴ *Meyers v. Hanchett*, 43 Wis. 246; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459. When a professional land agent acts as agent for both buyer and seller, and that is known to them, the law requires the most perfect good faith on his part. *Morgan v. Hardy*, 16 Neb. 427.

⁶⁵ *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279; *Burke v. Bours*, 98 Cal. 171, 32 Pac. 980; *Montgomery v. Hundley*, 205 Mo. 138, 103 S. W. 527. Where an agent purchases property himself the fact that it brought the price at which he was authorized to sell will not validate the transaction. *Tillery v. Wolverton*, 46 Minn. 256, 48 N. W. 908; *Rich v. Black*, 173 Pa. St. 92, 33 Atl. 880.

⁶⁶ *Hiltson v. Browne*, 3 Colo. 304; *Stevens v. Ewing*, 87 Tenn. 46, 9 S. W. 230.

⁶⁷ *Stevens v. Ewing*, *supra*; *Johnson v. Hulings*, 103 Pa. St. 498; *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385.

⁶⁸ *Tedrick v. Hiner*, 61 Ill. 189; *Ames v. Kilman*, 10 Metc.

§ 27. **Joint agents.** A person may, if he see fit, create a joint agency, and the law will enforce his desire to benefit by the combined judgment or talent of two or more agents.⁶⁹ Thus where two persons are appointed jointly to manage, for a specified term, the business of the principal, and one of them becomes incapacitated, the business can not be performed by the other alone; and the principal is free to discontinue the agency, without breach of contract, before the expiration of the term.⁷⁰ So where a power is given to A and B to sell land, the same can not be executed by either of them individually; unless an intention to confer a several, as well as a joint authority, is clearly manifest.⁷¹ And the same rule is applicable where authority is conferred upon more than two agents; all must act in the execution of the power, and unless a contrary intention appears, an intermediate number, though a majority of all, would have no authority to bind the principal.⁷²

§ 28. **Public agency.** In the case of a public agency, such as a school board, a board of commissioners and the (Mass.) 239; *McIver v. Clarke*, 69 Miss. 408, 10 South. 581. Where however, an attorney had been admitted to the state courts; was entitled to admission to the U. S. District Court, and did, in fact, practice therein without question, he may, in the absence of statutory provision or rule of court, prohibiting it, recover for services rendered in such court, though never formally admitted to practice therein. — *Harland v. Lillenthal*, 53 N. Y. 438.

⁶⁹ *Mason v. Walkowich*, 80 C. C. A. 435, 150 Fed. 699; *Copeland v. Insurance Co.*, 6 Pick. (Mass.) 198; *Commonwealth v. Commissioners*, 9 Watts (Pa.), 470.

⁷⁰ *Salisbury v. Brisbane*, 61 N. Y. 617.

⁷¹ *Hawley v. Keeler*, 53 N. Y. 114; *Kupper v. Augusta*, 12 Mass. 185; *Soens v. Racine*, 10 Wis. 271; *U. S. Fidelity & Guaranty Co. v. Ettenheimer*, 70 Neb. 147, 99 N. W. 652.

⁷² *Brennan v. Wilson*, 71 N. Y. 502; *Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98; *Hartford Ins. Co. v. Willcox*, 57 Ill. 180.

like, majority action is usually sufficient, provided all members had notice of the meeting at which such action was taken and opportunity to attend the same.⁷³ The rule was comprehensively stated as follows, in an early Massachusetts case in which the validity of an assessment was questioned because made by only two of three assessors: "Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law, if so prescribed, or by the rules and regulations of the body itself, if there be any; otherwise if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend, if there be a quorum. In the present case, all three having had notice and an opportunity to act, the act of two is sufficient."⁷⁴

⁷³ *First Nat. Bank v. Mt. Tabor*, 52 Vt. 37, 36 Am. Rep. 734; *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *Cooley v. O'Connor*, 12 Wall. (U. S.) 391; *Martin v. Lemon*, 28 Conn. 192; *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *Louk v. Woods*, 15 Ill. 256; *Jefferson County v. Slagle*, 66 Pa. St. 202.

⁷⁴ *Williams v. School District*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243. This same rule is usually applicable to a board of directors of a corporation. Unless otherwise expressly provided, a majority of directors constitutes a quorum, and by majority vote, may bind the corporation. *McNeill v. Chamber of Commerce*, 154 Mass. 277, 28 N. E. 245.

CHAPTER III.

DELEGATION OF AUTHORITY—ILLEGALITY OF OBJECT.

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II. Illegality of object.

- § 38. In general.
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I. Delegation of Authority.

§ 29. In general. It is the general rule that whatever a person may do himself he may do by agent. This broad statement, however, must be qualified by at least two important exceptions. Acts essentially of a personal nature, or those which are required by statute to be personally performed, can not be delegated. And so, authority which has been conferred upon an agent can not, as a rule, be delegated by him to a subagent.

§ 30. **Personal acts.** A few acts, from their nature, require personal performance. A man could not do homage by attorney; ¹ enter into marriage through an agent; or authorize another person to make his will.² Political rights and duties, such as the right to vote, or to fill public office, can not, of course, be delegated; ³ and, in the absence of authorization in charter or by-law, a stockholder of a corporation can not vote by proxy.⁴ So, where powers requiring the exercise of discretion and judgment are conferred upon an individual, he can not delegate their performance to another.⁵ Thus, executors, guardians and trustees can not delegate their trusts.⁶

§ 31. **Acts required by statute to be personally performed.** Where rights, duties or powers are of statutory origin, the question whether they can be delegated must find

¹ *Combes' Case*, 9 Coke 75.

² *Robins v. Coryell*, 27 Barb. (N. Y.) 556; *Chafee v. Baptist Convention*, 10 Paige (N. Y.), 85. A person, however, may usually authorize another to affix his signature to a will in his presence. *In re Mullen's Estate*, 110 Cal. 252, 42 Pac. 645; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Page on Wills*, § 174.

³ *Opinion of Judges*, 41 N. H. 550; *People v. Blodgett*, 13 Mich. 127; *Lewis v. Lewis*, 9 Mo. 183, 43 Am. Dec. 540; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Mechem on Public Officers*, § 565 et seq. Ministerial duties of a public officer may be performed by a deputy. *Abrams v. Ervin*, 9 Iowa, 87.

⁴ *Taylor v. Griswold*, 14 N. J. Law, 222, 27 Am. Dec. 33.

⁵ *Singleton v. Scott*, 11 Iowa, 589; *Coleman v. Beach*, 97 N. Y. 545; *Litka v. Wilcox*, 39 Mich. 94.

⁶ *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236; *St. Peter v. Denison*, 58 N. Y. 421. Where a discretionary power of sale is given an executor, he may delegate the execution and delivery of the deed to another, provided the negotiation of the sale and the agreement to all its details has been made by himself. *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247.

answer in a proper construction of the statute creating them.⁷ Thus, where an act for the licensing of vessels provided for an oath of ownership by the owner, an oath in his behalf, by an agent was held insufficient;⁸ and when a commissioner to take acknowledgments in another state is required by statute to file an impression of his seal, together with his oath of office and signature, the implication is clear that the signature must be in the proper handwriting of such commissioner.⁹ So generally, in the case of oaths, and where the clear purpose of the statute is to secure the personal signature of a party.¹⁰ Under statutes empowering a married woman to convey her land by joint deed with her husband, it has frequently been held that a conveyance by agent was invalid, though the power of attorney is executed by husband and wife jointly and acknowledged in the manner required for a deed.¹¹ Such

⁷ *Sumner v. Conant*, 10 Vt. 9; *Lewis v. Coxe*, 5 Har. (Del.) 401; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105. Thus under an act requiring that an acknowledgment of a debt, in order to take it out of the statute of limitations, must be signed by the party chargeable, it was held that the signature must be personally affixed; for the reason that the act in question was one of a series that distinguished between a signature by the party and a signature by agent. *Hyde v. Johnson*, 2 Bing. (N. C.) 776 (Eng.); *Swift v. Jewsbury*, L. R. 9 Q. B. (Eng.) 301.

⁸ *United States v. Bartlett, Dav.* (U. S.) 9, Fed. Cas. No. 14,532.

⁹ *Finnegan v. Lucy*, 157 Mass. 439, 32 N. E. 656.

¹⁰ *Henshaw v. Foster*, 9 Pick. (Mass.) 312; *In re McIlwaine*, 18 N. J. Eq. 499; *Dickson v. Morgan*, 7 La. Ann. 490. Under an act providing that when the signature of a person is required, he must write it or make his mark, a return of a constable signed by another, though in his presence and by his direction, is insufficient. *Chapman v. Limerick*, 56 Me. 390. So, the power to answer interrogatories under oath can not be conferred by one person on another. *Dickson v. Morgan*, 7 La. Ann. 490.

¹¹ *Mott v. Smith*, 16 Cal. 533; *Holland v. Moon*, 39 Ark. 120; *McCreary v. McCorkle* (Tenn. Ch.), 54 S. W. 53.

a strict construction of statutes of this character, however, is not approved by the Supreme Court of the United States. "Where the person is by statute allowed to do the principal thing directly," says Mr. Justice Peckham, in a recent case, "we think she could do it by power of attorney. The power to convey includes the power to appoint another to do the same thing. We, therefore, agree with the views expressed by some of the text writers;—when power is given by statute to married women to convey their interest in real estate, where their husbands join in the conveyance and where the private examination is had, that in such cases the right of the wife to dispose of it by power of attorney, joined in by her husband, and where she was privately examined, etc., would naturally be implied."¹² So, generally, where a document is required to be signed by a person, the signature, in the absence of expression, or clear implication, to the contrary, may be affixed in his behalf by an agent.¹³

§ 32. Delegated authority can not be delegated. The doctrine that authority delegated to an agent can not, in turn, be delegated by him, has been crystalized into a legal maxim;—*Delegatus non potest delegare*. The reason for the rule is the very practical one that a person naturally wishes to exercise his own judgment in the selection of an agent, and furthermore that a man can not be obligated by a contract of agency into which he has not entered, nor be bound by the acts of an agent whom he himself did not ap-

¹² *Williams v. Paine*, 169 U. S. 55.

¹³ *Sanborn v. Flagler*, 9 Allen (Mass.), 474; *Brayley v. Kelly*, 25 Minn. 160; *Wellington v. Jackson*, 121 Mass. 157. Signature to a will or deed may be affixed by agent. *Lord v. Lord*, 58 N. H. 7; *Vernon v. Kirk*, 3 OPa. St. 218; *Burns v. Lynde*, 6 Allen (Mass.), 305; *Frost v. Deering*, 21 Me. 156.

point, or to whom he gave no authority to represent him.¹⁴ Where, however, the principal expressly authorizes an agent to delegate a power conferred, or where such authority may reasonably be implied, the reason for the rule fails and the rule itself does not apply.¹⁵

§ 33. **Appointment of subagent.** In the absence of express or implied authority to do so, an agent has no power to appoint a subagent.¹⁶ Any act, therefore, which an agent, without authority, causes to be performed by a third person in behalf of his principal, is not the act of the principal, and is in no way binding upon him;¹⁷ nor will such appointment of a subagent create any legal relation between him and the principal.¹⁸ Thus where goods are intrusted to a factor for sale and, without authority, he turns them over to a third person to be sold, a sale by the latter

¹⁴ Connor v. Parker, 114 Mass. 331; Harralson v. Stein, 50 Ala. 347; Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319. If a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they should be. Haluptzok v. Railway Co., 55 Minn. 446, 57 N. W. 144.

¹⁵ Williams v. Woods, 16 Md. 220; Newell v. Smith, 49 Vt. 225; Weaver v. Carnall, 35 Ark. 198, 37 Am. Rep. 22.

¹⁶ Bond v. Hurd, 31 Mont. 314, 78 Pac. 579; Ruthven v. Insurance Co., 92 Iowa, 316, 60 N. W. 663; Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280; Fairchild v. King, 102 Cal. 320, 36 Pac. 649. One who has a bare power of authority from another to do any act, must execute it himself; for this being a trust or confidence reposed in him personally, it cannot be assigned to one whose integrity or ability may not be known to the principal. Wright v. Boynton, 37 N. H. 9.

¹⁷ Cullinan v. Bowker, 180 N. Y. 93, 72 N. E. 911; Peterson v. Christensen, 26 Minn. 377, 4 N. W. 623; Waldman v. Insurance Co., 91 Ala. 170, 8 South. 666; Brewster v. Hobart, 15 Pick. (Mass.) 302.

¹⁸ Barnard v. Coffin, 141 Mass. 37, 6 N. E. 364; California Bank v. Western Union Tel. Co., 52 Cal. 280.

would be invalid.¹⁹ So, a person authorized to sell land can not delegate the performance of the agency to another;²⁰ and an agent authorized to collect and receive money can not delegate the authority to a subagent.²¹ Where, however, a principal authorizes the appointment of a subagent, he thereby confers authority upon the latter, in advance, to represent him, and consequently will be bound by his acts.²² And authority to appoint subagents need not be expressly given, but may be implied.²³

§ 34. **Implied authority to appoint subagents.** Ordinarily, an agent is chosen with a view to his fitness to properly perform the duties of the agency, depending generally upon his possession of judgment, honesty and skill. Where, therefore, the nature of an agency is such that performance of all its duties requires an exercise of these personal qualifications, no authority will be implied to delegate any of them to a subagent.²⁴ By the same token, however, the law assumes that a principal does not object to a delegation by

¹⁹ *Hunt v. Douglass*, 22 Vt. 128; *Warner v. Martin*, 11 How. (U. S.) 209, 223.

²⁰ *Tynan v. Dulling* (Tex. Civ. App.), 25 S. W. 465; *Bocock v. Paye*, 8 Ohio St. 270.

²¹ *Lewis v. Ingersoll*, 3 Abb. Dec. (N. Y.) 50; *Fellows v. Northrup*, 39 N. Y. 117. So a person authorized to accept bills of exchange or to make promissory notes can not delegate this authority to another. *Commercial Bank v. Norton*, 1 Hill (N. Y.), 501.

²² *Wicks v. Hatch*, 62 N. Y. 535; *Emerson v. Providence Hat Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Blowers v. Southern Railway Co.*, 74 S. C. 221, 54 S. E. 368.

²³ *Eldridge v. Holway*, 18 Ill. 445; *Grady v. Insurance Co.*, 60 Mo. 116; *Smith v. Sublett*, 28 Tex. 163; *Arff v. Insurance Co.*, 125 N. Y. 57, 25 N. E. 1073.

²⁴ *Lynn v. Burgoyne*, 52 Ky. 400; *Planters', etc., Bank v. First Nat. Bank*, 75 N. C. 534; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Emerson v. Providence Hat Co.*, 12 Mass. 237, 7 Am. Dec. 66.

his agent of minor duties, which do not require, in their performance, the exercise of judgment and discretion.²⁵ And so, the nature of an agency, or the dealings of the parties, may be such as reasonably to raise an implication of authority to appoint subagents.²⁶

§ 35. **Ministerial acts.** In the absence of express restriction, an agent has implied authority to delegate to a subagent performance of a ministerial act which does not require the exercise of discretion.²⁷ Thus, an agent to sell land may employ another to exhibit the land to prospective purchasers,²⁸ and to conclude a sale upon the terms fixed;²⁹ an agent authorized to make a contract, after he has determined the provisions thereof, may assign to another the mechanical task of reducing the contract to writing;³⁰ so, an insurance agent may employ clerks to deliver policies and collect premiums.³¹ And generally, an agent has implied authority to delegate the performance of clerical duties that arise in connection with the agency.³²

²⁵ *Williams v. Woods*, 16 Md. 220; *Grinnell v. Buchanan*, 1 Daly (N. Y.), 538; *Joor v. Sullivan*, 5 La. Ann. 177.

²⁶ *McConnell v. McCormick*, 12 Cal. 142; *Harris v. San Diego Flume Co.*, 87 Cal. 526, 25 Pac. 753; *Saveland v. Green*, 40 Wis. 431.

²⁷ *Grady v. American Central Ins. Co.*, 60 Mo. 116; *Weaver v. Carnall*, 35 Ark. 198, 37 Am. Rep. 22; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Newell v. Smith*, 49 Vt. 255.

²⁸ *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800.

²⁹ *Renwick v. Bancroft*, 56 Iowa, 527, 9 N. W. 367.

³⁰ *Commercial Bank v. Norton*, 1 Hill (N. Y.), 501; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280.

³¹ *Arff v. Insurance Co.*, 125 N. Y. 57, 25 N. E. 1073.

³² *Norwick University v. Denny*, 47 Vt. 13; *Cook v. Insurance Co.*, 7 Daly (N. Y.), 555.

§ 36. Implication of authority from nature of agency. Except as to ministerial acts, authority to employ subagents is usually not implied from the fact of the existence of an agency. The nature of an agency, however, or the circumstances of the case, may be such as reasonably to raise an implication of such authority. The controlling factor is the intention of the parties. Thus, if from previous dealings of a like nature, the principal has knowledge that it is the agent's practice to avail himself of the service of subagents, an unrestricted appointment implies assent to that mode of performance.³³ So, if the character of an agency is such as to make necessary the employment of assistants, authority to do what is necessary in furtherance of the agency will be implied from the fact of its creation.³⁴ Hence authority to prosecute an action implies authorization to employ an attorney to conduct the case.³⁵ Where a bank is authorized to collect a note, it has implied authority, if necessary, to employ a notary to protest it;³⁶ and, if the note is payable at a distant place, authority to employ an agent for collection at the place of payment will be implied.³⁷ So, an agent appointed to manage generally the business of his principal, has implied authority to employ

³³ *Johnson v. Cunningham*, 1 Ala. 249; *Loomis v. Simpson*, 13 Iowa, 532; *Warner v. Martin*, 11 How. (U. S.) 223.

³⁴ *Davis v. Matthews*, 8 S. D. 300, 66 N. W. 456. Authority of an agent to collect a debt implies authority to use all ordinary means for collection. *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 797. So a stockbroker has implied power to employ a subagent where the purchase or sale is to be made in a distant place. *Rosenstock v. Tormey*, 32 Md. 169.

³⁵ *Buckland v. Conway*, 16 Mass. 396.

³⁶ *Warren Bank v. Bank*, 10 Cush. (Mass.) 582; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83.

³⁷ *Commercial Bank v. Martin*, 1 La. Ann. 344, 45 Am. Dec. 87; *Dorchester, etc., Bank v. Bank*, 1 Cush. (Mass.) 177; *Appleton*

such assistants as may be reasonably necessary to properly conduct the business.³⁸ "We know according to the ordinary course of business," said Earl, J., in a leading New York case, "that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principal in any way of business which they are authorized [by the agent] to transact. The act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if done by the agent in person. The maxim of *Delegatus non potest delegare* does not apply in such a case."³⁹

Following the same principle, if it is a well established usage of the business, in which an agent is engaged, to appoint subagents, a principal will be presumed to have made the appointment with a view to the existence of such usage; and in the absence of expression to the contrary, authority to appoint subagents will be implied.⁴⁰ Thus, where it is the usage of the business for a broker, authorized to sell property, to employ another to effect a sale, authority to do so, in a given case, is implied from the existence of such usage.⁴¹ "Business to an immense amount has been transacted in this way," said the court in an early Pennsylvania

Bank v. McGilvray, 4 Gray (Mass.), 518, 64 Am. Dec. 92; *Wilson v. Bank*, 187 Ill. 222, 58 N. E. 250.

³⁸ *McConnell v. Mackin*, 22 App. Div. 537, 48 N. Y. Supp. 18; *Arff v. Insurance Co.*, 125 N. Y. 57, 25 N. E. 1073.

³⁹ *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566.

⁴⁰ *Wilson v. Smith*, 3 How. (U. S.) 763; *Darling v. Stanwood*, 14 Allen (Mass.), 504; *Smith v. Sublett*, 28 Tex. 163. Such authority, of course, will not be implied if the usage is contrary to express instructions or limitation of the agent's power. *Emerson v. Providence Hat Co.*, 12 Mass. 237.

⁴¹ *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 440.

case, "and the usage being established, it follows that when the plaintiff authorized his broker to sell, he authorized him to sell according to the usage; and when the defendants dealt with the broker they had a right to consider him as invested with power to deal according to usage."⁴² So, authority to employ a subagent would be implied where unforeseen emergencies render it imperatively necessary to do so.⁴³ Thus, upon the sudden sickness or absence of a brakeman, the conductor of a train, if an emergency exists, would have implied authority to employ a temporary substitute.⁴⁴

§ 37. *The relation of the parties.* A subagent, whether appointed in pursuance of express or implied authority, becomes so far as third parties, with whom he deals, are concerned, the agent of the principal, who is bound by his acts and contracts within the scope of the properly delegated authority.⁴⁵ A perfect relation of agency, however, is not always created between the principal and subagent; and in some cases no rights or obligations arise between them.⁴⁶ Thus where an agent undertakes the performance of a particular business, such as the sale of a tract of land, he assumes a position somewhat analogous to that of an independent contractor, in so far as he has implied authority to appoint subagents—at least for performance of ministerial acts—but may not, ordinarily, obligate the principal for

⁴² *Laussatt v. Lippincott*, *supra*.

⁴³ *Story on Agency*, § 201; *Fox v. Railway Co.*, 86 Iowa, 368, 53 N. W. 259.

⁴⁴ *Sloan v. Railway Co.*, 62 Iowa, 728, 16 N. W. 331; *Georgia Pac. Ry. Co. v. Propst*, 83 Ala. 518, 3 South. 764.

⁴⁵ *Duluth Nat. Bank v. Fire Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 744; *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364; *Exchange Nat. Bank v. Bank*, 112 U. S. 276.

⁴⁶ *Sexton v. Weaver*, 141 Mass. 273; *Commercial Bank v. Jones*, 18 Tex. 811; *Wyman v. Snyder*, 112 Ill. 99, 1 N. E. 469.

the subagent's compensation.⁴⁷ A subagent, in such a case, becomes in reality the agent of the original attorney, and to him he must look for compensation. And so, the original attorney is responsible to the principal for misconduct or default of the subagent.⁴⁸ In many instances, of course, there may be direct privity of contract between the subagent and the principal. Whether this is the case, must be determined from the nature of the agency, the manner of appointment, or ultimately from the intention of the parties.⁴⁹ Where a principal expressly authorizes the appointment of a subagent, in the absence of stipulation to the contrary, such privity of contract is usually held to exist.⁵⁰ But

⁴⁷ *Russell v. Andrae*, 79 Wis. 108, 48 N. W. 117; *Rice v. Post*, 78 Hun (N. Y.), 547, 29 N. Y. Supp. 553. Where an agent having undertaken the performance of some duty, employs, on his own account, a subagent to assist him, the subagent must look to his immediate employer for compensation and not to the principal. *Houston County Oil Co. v. Bibby*, 43 Tex. Civ. App. 100, 95 S. W. 562.

⁴⁸ *Triplett v. Jackson*, 130 Iowa, 408, 106 N. W. 954; *St. Louis, etc., Ry. Co. v. Smith*, 48 Ark. 317, 3 S. W. 364. Where a subagent is employed with the assent, or by the direction, of the principal, the superior agent will not be responsible for his acts. There is, in such case, privity between the subagent and principal, and the latter must seek a remedy directly against the subagent for his negligence or misconduct. *Guelich v. Bank*, 56 Iowa, 434, 9 N. W. 328.

⁴⁹ *Exchange Nat. Bank v. Bank*, 112 U. S. 276; *Loomis v. Simpson*, 13 Iowa, 532; *National S. S. Co. v. Sheahan*, 122 N. Y. 461, 25 N. E. 858; *Furnas v. Frankman*, 6 Neb. 429; *Davis v. King*, 66 Conn. 465, 34 Atl. 107. That a principal recognized a subagent and accepted his services does not necessarily prove an agreement to pay for the services. *Homan v. Brooklyn Life Ins. Co.*, 7 Mo. App. 22.

⁵⁰ *Wicks v. Hatch*, 62 N. Y. 535; *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574.

where authority is implied, the determination is more difficult. Thus where an agent is authorized to collect a note at a distant place, he has implied authority to send the note to a subagent at such place for collection; but does such subagent become the agent of the principal, or merely the agent of the original attorney? Some of the cases adopt the former alternative; hold that the subagent is the agent of the principal, who is liable for his compensation, and that the original attorney, provided he used reasonable care in the selection, is not responsible to the principal for the subagent's default or misconduct.⁵¹ Other cases hold the contrary; deem the subagent the agent of the original appointee, and place upon the latter responsibility for the former's acts or defaults.⁵² Under either holding, payment by the debtor to the subagent is deemed payment to the principal.⁵³

⁵¹ *Dorchester, etc., Bank v. Bank*, 1 Cush. (Mass.) 177; *Guelich v. Bank*, 56 Iowa, 434, 9 N. W. 328; *Third Nat. Bank v. Bank*, 61 Miss. 112, 48 Am. Rep. 78; *Stacy v. Bank*, 12 Wis. 629; *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101, 48 N. E. 601; *Wilson v. Bank*, 187 Ill. 222, 58 N. E. 250; *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *First Nat. Bank v. Sprague*, 34 Neb. 318, 51 N. W. 846.

⁵² *Exchange Nat. Bank v. Bank*, 112 U. S. 276; *Ayrault v. Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Streissguth v. Bank*, 43 Minn. 50, 44 N. W. 797; *State Bank v. Manufacturing Co.*, 17 Tex. Civ. App. 214, 42 S. W. 1016. The foundation for all the differences of opinion among the courts appears to rest in the interpretation of the implied contract between the depositor and the bank at the time the negotiable paper is deposited for collection. *Power v. Bank*, 6 Mont. 251, 12 Pac. 597.

⁵³ *Dorchester Bank v. Bank*, 1 Cush. (Mass.) 177; *Guelich v. Bank*, 56 Iowa, 434, 9 N. W. 328; *Ante* § 33.

II. *Illegality of Object.*

§ 38. **In general.** It is stated as the rule that authority can not be delegated to do an act which is illegal, immoral or opposed to public policy.⁵⁴ What is actually done, however, can be done. Authority to do wrongful acts is frequently delegated, and the principal, who authorized the same, is responsible for them.⁵⁵ Thus a person who instigates the commission of a crime is criminally responsible for the act;⁵⁶ and one who authorizes a tort must respond in damages for the injury committed.⁵⁷ So, a person may ratify a tortious act done in his behalf, without authority, and thus assume responsibility for the same.⁵⁸ What the rule under discussion means is that where the purpose of

⁵⁴ Mechem on Agency, § 19.

⁵⁵ *State v. Smith*, 78 Me. 260, 4 Atl. 412; *Palmeri v. Railway Co.*, 133 N. Y. 261, 30 N. E. 1001; *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312.

⁵⁶ *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Barnes v. State*, 19 Conn. 398; *Allyn v. State*, 21 Neb. 593, 33 N. W. 212. It is immaterial that the criminal act is done through an innocent agent, such as a child incapable of criminal intent, or a grown person acting through mistake. *State v. Learnard*, 41 Vt. 585; *Gregory v. State*, 26 Ohio St. 510. So in certain statutory offenses, such as opening a saloon on Sunday, the employer, though innocent, is held responsible for the act of his agent. *People v. Roby*, 52 Mich. 577, 18 N. W. 365; *State v. McCance*, 110 Mo. 398, 19 S. W. 648. The doctrine involved here is really that of principal and accessory. See McClain, *Crim. Law*, § 204.

⁵⁷ *Cooley on Torts*, Chap. XVIII; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595.

⁵⁸ *Morehouse v. Northrup*, 33 Conn. 380, 89 Am. Dec. 211; *Dun v. Hartford, etc., Ry. Co.*, 43 Conn. 434; *Benton v. Beattie*, 63 Vt. 186, 22 Atl. 422; *Brown v. Webster City*, 115 Iowa, 511, 88 N. W. 1070. In order to bind the absent party with the commission of a trespass there must be evidence to show that he received the

an agency is illegal, immoral or opposed to public policy, the contract of agency,—that is, the contract of employment between principal and agent—is invalid, and its terms will not be enforced by the courts.⁵⁹ Thus if A employs B to perpetrate a fraud or commit an assault upon C, the agent, though he performs the undertaking, can not enforce his contract for compensation; nor can A, the principal, recover damages for violation of instructions, or other breach of the contract. The law will not sanction or enforce a contract of this character.⁶⁰ C, the injured party, however, may recover damages against A for the wrong which he instigated.⁶¹ The doctrine with which we are dealing is not peculiar to the law of agency. It is merely a doctrine of the law of contracts which applies to a contract of agency.⁶² It is the rule, then, that where the purpose of an agency, or other employment, is illegal, immoral or opposed to fair dealings or public policy, the contract of employment will not be sanctioned by the law, nor its terms enforced by process of the courts.⁶³

benefits thereof with guilty knowledge. *Holliday v. Jackson*, 30 Mo. App. 263.

⁵⁹ *Oscanyan v. Arms Co.*, 103 U. S. 261; *Mohr v. Miessen*, 47 Minn. 228, 49 N. W. 862.

⁶⁰ *Evans v. Collier*, 80 Ga. 130, 4 S. E. 264; *Thomas v. Caulkett*, 57 Mich. 392, 24 N. W. 154. An action to compel an agent to render an account of his agency in buying cotton with confederate obligations given him by the principal can not be maintained. *Wells v. Addison*, 20 La. Ann. 295.

⁶¹ *Cooley on Torts*, Chap. V; *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312; *Maier v. Randolph*, 33 Kan. 340, 6 Pac. 625.

⁶² *Bishop on Contracts*, Chap. XVIII; *Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380.

⁶³ *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746; *Crichfield v. Bermudez Asphalt Co.*, 174 Ill. 466, 51 N. E. 552.

§ 39. **Appointment to do illegal acts.** It follows from the doctrine laid down in the preceding section that the appointment of an agent to perform an undertaking which is contrary to law would be invalid, so far, at least, as rights and obligations *inter se* are concerned. Thus, an agreement to commit murder, arson or other crime; ⁶⁴ to sell liquor contrary to the statute; or to perpetrate a fraud or other tort, would be invalid; ⁶⁵ as would an undertaking to perform an act contrary to public policy or fair dealings, such as improperly influencing governmental action, ⁶⁶ or corrupting the agent of another. ⁶⁷

§ 40. **Services in influencing legislation.** It is of paramount importance to the welfare of the state that its sources of legislation be kept pure, and that all governmental action be done with a view solely to the common weal. Hence contracts for services in influencing legislation or other governmental action are void. ⁶⁸ The most frequent example

⁶⁴ *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260; *Jewett Pub. Co. v. Butler*, 159 Mass. 517, 34 N. E. 1087.

⁶⁵ *Bixby v. Moor*, 51 N. H. 402; *Kelly v. Scott*, 49 N. Y. 595; *Gray v. McReynolds*, 65 Iowa, 461, 21 N. W. 777; *Fuller v. Rice*, 52 Mich. 435, 18 N. W. 204. Any contract made in furtherance of a business carried on in violation of the public policy of the state is void. *Thomas v. First Nat. Bank*, 213 Ill. 261, 72 N. E. 801. A contract for the commission of an offense which is *malum prohibitum* is unenforceable just as if the offense was *malum in se*. *Haggerty v. St. Louis Ice. Mfg. Co.*, 143 Mo. 238, 44 S. W. 1114.

⁶⁶ *Le Tourneaux v. Gilliss*, 1 Cal. App. 546, 82 Pac. 627; *Howard v. Murphy*, 70 N. J. Law, 141, 56 Atl. 143.

⁶⁷ *Summers v. Carey*, 69 App. Div. 428, 74 N. Y. Supp. 980; *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385.

⁶⁸ *Colusa County v. Welch*, 122 Cal. 428, 55 Pac. 243; *McDonald v. Buckstaff*, 56 Neb. 88, 76 N. W. 476. All indirect or private methods of influencing public officials in respect to public business

of contracts of this character are those providing for lobbying services. The law views such contracts with gravest suspicion, and determines their validity from consideration of their general nature and natural tendency rather than from the question whether, in pursuance of their terms, actual wrong was done or event contemplated.⁶⁹ Thus, a contract based upon the consideration that one of the parties would give all aid in his power, and use his influence, to secure the passage of a particular law, was held invalid; for the reason that though the parties did not necessarily stipulate for corrupt action or intend that corrupt means should be used, yet the contract tended to that end and furnished a temptation to resort to improper devices to influence legislation.⁷⁰ And so, an agreement to prosecute and superintend, in the capacity of agent and attorney, a perfectly legitimate claim before the legislature, was held contrary to public policy and void, on the ground that a person could not superintend and prosecute such a claim without resorting to personal solicitation with the members.⁷¹

All effort, however, to procure the adoption of legislation is not necessarily in contravention of public policy. Thus a person might present a petition to a legislative body, sub-

intrusted to them are immoral and against public policy, and contracts to compensate agents or attorneys for rendering such services will not be enforced by the courts. *Hayward v. Nordberg Mfg. Co.*, 29 C. C. A. 438, 85 Fed. 4.

⁶⁹ *Clippinger v. Hepbaugh*, 5 Watts & Serg. (Pa.) 315, 40 Am. Dec. 519; *Trist v. Child*, 21 Wall. (U. S.) 441; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Hazelton v. Sheckels*, 202 U. S. 71.

⁷⁰ *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Owens v. Wilkinson*, 20 App. (D. C.) 51; *Veazey v. Allen*, 173 N. Y. 359, 66 N. E. 103.

⁷¹ *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Le Tourneau v. Gilliss*, 1 Cal. App. 546, 82 Pac. 627; *Richardson v. Scotts Bluff County*, 59 Neb. 400, 81 N. W. 309.

mit facts in support thereof, and appear before the proper committee to make public argument; and, by the same token, might employ an agent to perform such services. The contract of employment in such case would not be invalid.⁷² "An agreement to pay for such service," said the court in an early Wisconsin case, "could be enforced; because a public discussion could not tend to deceive or corrupt the legislature; while personal solicitation and influence might produce that result."⁷³ The contract of employment, however, must expressly limit the services to those of a legitimate character, or it will be void, even though in pursuance of it, legitimate services only were actually rendered.⁷⁴

§ 41. Procuring other governmental action. Contracts for services in influencing action by departments of government other than the legislative, or by officers thereof, are in like manner contrary to public policy and void.⁷⁵ Hence compensation can not be recovered for services ren-

⁷² *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Sedgwick v. Stanton*, 14 N. Y. 289; *Stroemer v. Van Orsdel*, 74 Neb. 132, 103 N. W. 1053; *Dunham v. Hasting Pavement Co.*, 57 App. Div. 426, 68 N. Y. Supp. 221; *Nutt v. Knut*, 200 U. S. 13, 26 Sup. Ct. 216.

⁷³ *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55.

⁷⁴ *Sweeney v. McLeod*, 15 Ore. 330, 15 Pac. 275; *Spaulding v. Ewing*, 149 Pa. St. 375, 24 Atl. 219; *Chippewa Valley Ry. Co. v. Chicago, etc., Ry. Co.*, 75 Wis. 224, 44 N. W. 17. An agreement between an attorney and his client for professional services to be rendered by the attorney in the procurement of Congressional legislation, which involves personal solicitation of members of Congress, will not be enforced by the courts, whether improper means are used or not in such solicitation. *Owens v. Wilkinson*, 20 App. (D. C.) 51.

⁷⁵ *Robison v. Patterson*, 71 Mich. 141, 39 N. W. 21; *Boyd v. Cochran*, 18 Wash. 281, 51 Pac. 383.

dered in improperly securing a government contract;⁷⁶ or the appointment of another to public office.⁷⁷ And so, where owners of land in a city agreed with the owner of an adjacent building that if he would offer his building to the government for use as a post-office for a nominal rental for a stated period, and use all proper persuasion to secure its acceptance, they would pay him a certain sum annually during that period, in case the government accepted the offer, the agreement was held invalid, and recovery according to its terms was not allowed.⁷⁸ "It is clear," said the court, "that a contract which is made for the purpose of securing the location of an important office, connected with the public service, for individual benefit, rather than for the public good, tends to the injury of the public service. A wholesome rule of law is that parties should not be permitted to make contracts which are likely to set private interests in opposition to public duty or to the public welfare."⁷⁹ To the same effect is the reasoning in *Providence Tool Co. v. Norris*, where an agent sued for compensation which had been made contingent on his procuring a favor-

⁷⁶ *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Nash v. Kerr Murry Mfg. Co.*, 19 Mo. App. 1. Employment of an agent to sell goods to the government is valid, where such agent was not expected to, and did not, resort to improper methods. *Swift v. Aspell & Co.*, 82 N. Y. Supp. 659. The rule under discussion applies to procurement of contracts from foreign governments. *Oscanyan v. Winchester Arms Co.*, 103 U. S. 261.

⁷⁷ *Liness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153; *Edwards v. Randle*, 63 Ark. 318, 38 S. W. 343; *Harris v. Chamberlain*, 126 Mich. 280, 85 N. W. 728.

⁷⁸ *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746; *Woodman v. Inness*, 47 Kan. 26, 27 Pac. 125. See *Fearnley v. De Mainville*, 5 Colo. App. 441, 39 Pac. 73, in which the rule is somewhat relaxed.

⁷⁹ *Elkhart County Lodge v. Crary*, *supra*.

able contract for muskets from the government. "The question, then, is this," said Mr. Justice Field, in delivering the opinion of the court, "can an agreement for compensation to procure a contract from the government to furnish its supplies, be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and those only, who will execute them most faithfully, and at the least expense to the government. . . . Agreements like the one under consideration tend to introduce personal solicitation and personal influence, as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service and to unnecessary expenditures of the public funds."⁸⁰

§ 42. Other contracts for services affecting the public.

A contract whereby one of the parties, for a personal consideration, agrees to use all of his influence to secure the other's election to a public office is invalid.⁸¹ "Its tendency," said the court, "is to corrupt the people upon whose integrity and intelligence the safety of the state depends,—to lead voters to work for individual interests rather than the public welfare."⁸² So, compensation for services in procuring a pardon can not be recovered, where personal influence was used;⁸³ and an undertaking to sup-

⁸⁰ *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45.

⁸¹ *Duke v. Asbee*, 33 N. C. 112; *Keating v. Hyde*, 23 Mo. App. 555; *Livingston v. Page*, 74 Vt. 356, 52 Atl. 965. A contract by a candidate for office to appoint a certain person his deputy, if elected, is contrary to public policy and void. *Conner v. Canter*, 15 Ind. App. 690, 44 N. E. 656.

⁸² *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548; *Martin v. Wade*, 37 Cal. 168.

⁸³ *Kribben v. Haycraft*, 26 Mo. 396; *Thompson v. Wharton*, 7

press evidence;⁸⁴ or to secure dismissal of a criminal action, would be contrary to public policy and void.⁸⁵

§ 43. **Services contrary to fair dealings.** The salutary doctrines laid down in the preceding sections apply, in the main, to dealings in private matters between private individuals.⁸⁶ Thus, an agreement to secure for another a position of trust by the use of personal or sinister influence would be invalid;⁸⁷ as would an undertaking to secure a

Bush. (Ky.) 563; *Brown v. Young*, 7 Ky. Law Rep. 664; *Haines v. Lewis*, 54 Iowa 307, 6 N. W. 495. A contract with an attorney that he shall endeavor to secure a pardon, and that if successful, a stipulated sum shall be paid for his services, is not in itself illegal. *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060.

⁸⁴ *Gillett v. Board Sup'rs, Logan County*, 67 Ill. 256; *Valentine v. Stewart*, 15 Cal. 387; *Crisup v. Grosslight*, 79 Mich. 380, 44 N. W. 621. So a contract to furnish evidence would be invalid. *Laffan v. Brillington*, 86 N. Y. Supp. 267; *Cowles v. Rochester Box Co.*, 179 N. Y. 87, 71 N. E. 468.

⁸⁵ *Collier v. Waugh*, 64 Ind. 456; *Rhodes v. Neal*, 64 Ga. 704, 37 Am. Rep. 93; *Ormerod v. Dearman*, 100 Pa. St. 561, 45 Am. Rep. 391; *Weber v. Shay*, 56 Ohio St. 116, 46 N. E. 377. No action will lie for compensation for services in endeavoring to prevent an indictment, and after its finding, to induce the public authorities to dismiss it. *Barron v. Tucker*, 53 Vt. 388, 38 Am. Rep. 684. *Relaxation of rule.*—A tendency is noticeable in some of the recent decisions to relax somewhat the strict application of the rules governing contracts which the earlier cases hold to be against public policy. *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784; *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063; *Fearnley v. DeMainville*, 5 Colo. App. 441, 39 Pac. 73; *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. 532.

⁸⁶ *Smith v. Humphrey*, 88 Me. 345, 34 Atl. 166; *Thomas v. Caulkett*, 57 Mich. 392, 24 N. W. 154; *Hinnen v. Newman*, 35 Kan. 709, 12 Pac. 144; *McDonnell v. Rigney*, 108 Mich. 276, 66 N. W. 52. Thus an agreement to locate a railway depot at a particular point has been held invalid. *Marsh v. Fairbury*, 64 Ill. 414; *Williamson v. Chicago, etc., Ry. Co.*, 53 Iowa, 126, 4 N. W. 870.

⁸⁷ *Woodruff v. Wentworth*, 133 Mass. 309; *Noel v. Drake*, 28 Kan.

contract with a private person or institution by corrupting one of its agents.⁸⁸ And where a real estate agent induces his principal to employ a lawyer with whom he has an agreement for division of fees, this scheme of the agent is contrary to fair and open dealings, and he can not enforce his agreement with the lawyer for division of profits.⁸⁹ So, an agreement to pay compensation for effecting a marriage, would be contrary to public policy and void;⁹⁰ as would a contract for services in selling tickets in a forbidden lottery;⁹¹ or engaging in other undertakings contrary to law, such as gambling in stocks.⁹²

§ 44. Conditions necessary to invalidate contract. An agent, however, may recover for services rendered, where he did not participate in the unlawful purpose of the prin-

265, 42 Am. Rep. 162; *Porter v. Jones*, 52 Mo. 399; *Aycock v. Braun*, 66 Tex. 201, 18 S. W. 500.

⁸⁸ *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385; *Lum v. McEwen*, 56 Minn. 278, 57 N. W. 662; *Smythe's Estate v. Evans*, 209 Ill. 376, 70 N. E. 906. A contract between a real estate agent acting for the vendor, and an agent acting for the vendee, to share the difference between the price paid by the vendee and the price received by the vendor, which contract is unknown to the vendee, is unenforceable. *Howard v. Murphy*, 70 N. J. Law 141, 56 Atl. 143.

⁸⁹ *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442.

⁹⁰ *White v. Equitable Nuptial Ben. Union*, 76 Ala. 251, 52 Am. Rep. 325; *Johnson v. Hunt*, 81 Ky. 321; *Morrison v. Rodgers*, 115 Cal. 252, 46 Pac. 1072. A promise by one desirous of marrying a certain woman, to pay a person if he would give the woman such information concerning the promisor as would tend to induce her to marry him can not be enforced. *In re Grobe's Estate*, 127 Iowa 121, 102 N. W. 804.

⁹¹ *Rolfe v. Delmafi*, 7 Robt. (N. Y.) 80.

⁹² *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. Rep. 573; *Stewart v. Schall*, 65 Md. 299, 57 Am. Rep. 327; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49.

cipal and had no knowledge thereof.⁹³ Thus, a broker, employed to bring parties together to contract, is not precluded from recovery of his commission by the fact that, without his participation, they enter into an unlawful contract.⁹⁴ So, where an agent is employed to perform several distinct services, and the contract of employment is not entire, he may recover for services which are legitimate, notwithstanding that he performed others which were contrary to public policy or unlawful.⁹⁵

⁹³ *Roundtree v. Smith*, 108 U. S. 269; *Patrick v. Littrell*, 36 Ohio St. 79; *Tracy v. Talmadge*, 14 N. Y. 162, 67 Am. Dec. 132.

⁹⁴ *Irwin v. Willmar*, 110 U. S. 499.

⁹⁵ *Bishop on Contracts*, § 487; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677.

CHAPTER IV.

APPOINTMENT OF AGENTS.

- § 45. In general.
- 46. Authority to execute sealed instruments.
- 47. Authority to fill blanks.
- 48. Authority to execute simple contracts required to be in writing.
- 49. Oral appointment
- 50. Implied appointment.
 - (a) In general.
 - (b) Implication from circumstances.
 - (c) Implication from acts or conduct.
 - (d) Relation of parties.
- 51. Estoppel.
- 52. Acceptance by agent.

§ 45. In general. As has been already indicated,¹ the contract upon which the relation of principal and agent is founded may, with few exceptions, be either written or verbal, and, as in the case of other contracts, it may be inferred from acts of the parties; furthermore, a person's conduct may have been such as to estop him to deny the contract. Reduced to more specific terms, the rule is that, except where by positive provision of law, the appointment of an agent is required to be under seal or in writing,² such appointment may be either written or verbal,³ or may be inferred from acts or circumstances.⁴ So, if a person's

¹ Ante § 2.

² Post §§ 46, 48.

³ Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160; Fay v. Richmond, 43 Vt. 25; Kirklin v. Association, 107 Ga. 313, 33 S. E. 83.

⁴ Farmers', etc., Bank v. Bank, 16 N. Y. 125, 69 Am. Dec. 678;

conduct has been such as to lead third parties reasonably to believe that another has authority to represent him as agent, such person will be estopped to deny the existence of the relation.⁵

§ 46. **Authority to execute sealed instruments.** Where a contract or other instrument is required by law to be under seal,⁶ the rule is imperative that authority to execute such an instrument in behalf of another must be conferred by a written power likewise under seal.⁷ In view of the importance attached by common law to the formality of the seal, it is a concession to permit delegation of power to execute an instrument of this character; and it is not surprising that the concession should be made only upon condition that such authority be conferred by an instrument of equal dignity with that to be executed by the agent. Thus, a power of attorney to convey land must possess the same requisites and observe the same solemnities as are necessary in a deed directly conveying the same;⁸ where a lease for more than a year is, by statute, required to be by deed, an agent's appointment to make the same must also be by

Eagle Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37; *Matteson v. Blackmer*, 46 Mich. 393, 9 N. W. 445; Post § 50.

⁵ *Martin v. Webb*, 110 U. S. 7; *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762; Post § 51.

⁶ *Bishop on Contracts*, Chap. IV; *Lawson on Contracts*, Chap. III.

⁷ *Banorjee v. Hovey*, 5 Mass. 11, 4 Am. Dec. 17; *Watson v. Sherman*, 84 Ill. 263; *Smith v. Dickinson*, 25 Tenn. (6 Humph.) 261, 44 Am. Dec. 306; *Cadell v. Allen*, 99 N. C. 542, 6 S. E. 399.

⁸ *Clark v. Graham*, 19 U. S. (6 Wheat.) 577; *Butterfield v. Beall*, 3 Ind. 203; *Peabody v. Hoard*, 46 Ill. 242; *Elliott v. Stocks*, 67 Ala. 336; *Overman v. Atkinson*, 102 Ga. 750, 29 S. E. 758. Thus a partner could not bind his firm by deed unless authorized under seal. *Harrison v. Jackson*, 7 T. R. (Eng.) 207.

deed;⁹ and if an indemnity bond is required by law to be under seal, it will be insufficient where executed by an agent acting under authority not under seal.¹⁰ Where, however, an instrument under seal is executed by an agent in the presence of his principal and by his direction, the rule does not apply.¹¹ Here, the execution is deemed the personal act of the principal, though done by the hand of another; and in contemplation of law there has been no delegation of authority.¹² A sealed instrument executed by an agent under parol authority will take effect as a simple contract, where the seal is not essential to the validity of the instrument.¹³ So, a deed of conveyance, ineffective because executed by an agent under parol authority, may be deemed a contract to convey, performance of which will be enforced in equity.¹⁴

⁹ *Lobdell v. Mason*, 71 Miss. 937, 15 South. 44.

¹⁰ *St. Louis Dairy Co. v. Sauer*, 16 Mo. App. 1. So, authority to release a debt, evidenced by an instrument under seal, must be given by a power under seal. *Wheeler v. Nevins*, 34 Me. 54.

¹¹ *Croy v. Busenbark*, 72 Ind. 48; *Videau v. Griffin*, 21 Cal. 389; *Meyer v. King*, 29 La. Ann. 567; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37.

¹² *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740. The validity of the deed can not rest upon the ground of agency. If such were the case, the authority would have to be by instrument under seal. *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386.

¹³ *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Wagoner v. Watts*, 44 N. J. Law, 126; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Shuetze v. Bailey*, 40 Mo. 69; *Marshall v. Rugg*, 6 Wyo. 270, 44 Pac. 700.

¹⁴ *Morrow v. Higgins*, 29 Ala. 448; *Jones v. Marks*, 47 Cal. 242; *Hersey v. Lambert*, 50 Minn. 373, 52 N. W. 963; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. 440. Where a person executed a deed, leaving blanks for the name of the grantee and the price, and gave it to an agent, with instructions to fill up the blanks and deliver to a purchaser, the instrument, though inoperative as a deed, because incomplete when signed and sealed, could be enforced by the

§ 47. **Authority to fill blanks.** Omission of a material part of an instrument, such as the designation of parties, or a description of subject matter, renders the same inoperative;¹⁵ and hence authority to an agent to supply such omissions—thus rendering the instrument operative—is equivalent to authority to execute the same. It follows, therefore, that authority to supply material omissions—to fill blanks—in an instrument under seal must, like authority to execute the same, be conferred by a power likewise under seal.¹⁶ The strict application of this rule is frequently avoided by invoking the doctrine of estoppel; it being held that where a grantor signs and seals a deed, containing unfilled blanks, and gives the same to an agent for delivery, with parol authority to fill the blanks, he will not be heard, as against an innocent grantee, to question the agent's authority.¹⁷ And so, many courts, though recognizing the doctrine that authority to execute a sealed instrument must be given under seal, repudiate its corollary, and hold that parol power is sufficient to authorize the filling of blanks in a sealed instrument.¹⁸

purchaser, by way of specific performance, as a contract of sale, it having been, in legal effect, signed by the person in his name by his lawfully authorized agent. *Blacknall v. Parish*, 59 N. C. 70, 78 Am. Dec. 239.

¹⁵ *Bishop on Contracts*, Chap. XLIV.

¹⁶ *Preston v. Hull*, 23 Gratt. (Va.) 600, 14 Am. Rep. 153; *Wunderlin v. Cadogan*, 50 Cal. 613; *Burns v. Lynde*, 6 Allen (Mass.), 305; *Adamson v. Hartman*, 40 Ark. 58. The part filled in must, of course, be material, for, if immaterial, the instrument was already complete. *Vose v. Dolan*, 108 Mass. 155.

¹⁷ *Phelps v. Sullivan*, 140 Mass. 36, 2 N. E. 121; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Nelson v. McDonald*, 80 Wis. 605, 50 N. W. 893.

¹⁸ *State v. Young*, 23 Minn. 551; *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 436; *Drury v. Foster*, 2 Wall. (U. S.) 24; *South*

§ 48. **Authority to execute simple contracts required to be in writing.** Many simple contracts are required by statute to be in writing, signed by the parties charged;¹⁹ and applying the theory of the doctrine applicable to sealed instruments, it might seem, at first blush, that authority to execute such contracts in behalf of another would likewise have to be written. Such, however, is not the rule. In the absence of statutory provision to the contrary, authority to execute a contract, required by law to be in writing, may be conferred upon an agent orally,²⁰ or may even be implied.²¹ Thus an agent may be authorized verbally to sign or indorse a note for his principal;²² to make a written contract for the sale or lease of land;²³ and authority to assign a mortgage, as agent for another, need not be in writ-

Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535; *Garland v. Wells*, 15 Neb. 298, 18 N. W. 132; *Palacios v. Brasher*, 18 Colo. 593, 34 Pac. 251; *Allen v. Withrow*, 110 U. S. 119. Seals have been abolished in some states, and their significance and legal effect have been generally modified by statute or judicial decision. See, *Barton v. Gray*, 57 Mich. 634; *State v. Young*, 23 Minn. 551.

¹⁹ *Bishop on Contracts*, Chap. XLVIII. At common law contracts were either specialties or parol; no distinction was made between simple written and oral contracts, both were parol contracts.

²⁰ *Webb v. Browning*, 14 Mo. 354; *Dodge v. Hopkins*, 14 Wis. 630; *Barker v. Garvey*, 83 Ill. 184; *Marshall v. Rugg*, 6 Wyo. 270, 44 Pac. 700.

²¹ *Trundy v. Farrar*, 32 M. 225; *McDonough v. Heyman*, 38 Mich. 334; *Hull v. Jones*, 69 Mo. 587; *Shaw v. Hall*, 134 Mass. 103.

²² *Bank of North America v. Embury*, 21 How. Prac. (N. Y.) 14; *Brown v. Bookstaver*, 141 Ill. 461, 31 N. E. 17. An act requiring power to indorse a note to be express and special, does not require that the power be in writing. *Peoples' Bank v. Scalzo*, 127 Mo. 164, 29 S. W. 1032.

²³ *Dodge v. Hopkins*, 14 Wis. 630; *Wagoner v. Watts*, 44 N. J. Law, 126; *Lake v. Campbell*, 18 Ill. 106.

ing.²⁴ The provision in statutes of frauds, requiring that certain agreements be signed by the party charged "or some other person thereunto lawfully authorized," does not, by implication, require that such other person be authorized in writing; but such authority may be orally conferred.²⁵ Where, however, the statute requires that authority to execute a contract for another—usually contracts for sale or lease of land—shall be written, such requirement must, of course, be complied with;²⁶ but the written authority in this case need not be of formal character.²⁷

§ 49. **Oral appointment.** When not required to be in writing, under the rules discussed in the preceding sections, appointment of an agent may, of course, be made orally, and any form of expression is sufficient which indicates an intention to confer authority.²⁸ "An agency is created—

²⁴ *Moreland v. Houghton*, 94 Mich. 548, 54 N. W. 285.

²⁵ *Hawkins v. Chace*, 19 Pick. (Mass.) 502; *Roehl v. Haumeser*, 114 Ind. 311, 15 N. E. 345; *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433. A different construction is adopted by the court in *Simpson v. Commonwealth*, 89 Ky. 412, 12 S. W. 630.

²⁶ *Chappell v. McKnight*, 108 Ill. 570; *Gerhart v. Peck*, 42 Mo. App. 644; *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 163; *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360; *Frahm v. Metcalf*, 75 Neb. 241, 106 N. W. 227; *Ramage v. Wilson*, 37 Ind. App. 532, 77 N. E. 368. Such provision is found in the statutes of Alabama, Arkansas, California, Colorado, Illinois, Michigan, Missouri, Pennsylvania, and a number of other states.

²⁷ Thus, informal authority, as directions by letter, will usually be sufficient. *Smith v. Allen*, 86 Mo. 178; *Lyon v. Pollock*, 99 U. S. 668. See *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53.

²⁸ *Geylin v. De Villeroi*, 2 Houst. (Del.) 311. If one acts for and in behalf of another, it is immaterial to the question of agency, so far as third parties are concerned, whether he acts by his direction or by his permission merely. *Fay v. Richmond*, 43 Vt. 25.

authority is actually conferred—very much as a contract is made," said Taft, J., in *Central Trust Co. v. Bridges*, "i. e., by an agreement between principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them." ²⁹

§ 50. Implied appointment. (a) In general. As in the case of contracts generally, the existence of a contract of agency may be implied from acts or circumstances, or from words not amounting to a direct expression of intention to create the same.³⁰ Where circumstances, or a person's acts, words or conduct are such as reasonably to raise an inference of intention to appoint an agent and to confer particular authority upon him, the law gives sanction and force to such inference, and holds the person to the consequences of his intention in the same manner as though it had found expression in written or spoken word.³¹ The intention of the party is the controlling factor, and such intention is given effect howsoever it may find expression. This doctrine is applicable to the contract of agency itself, considered merely as a contract of employment;³² but its

²⁹ *Central Trust Co. v. Bridges*, 6 C. C. A. 539, 57 Fed. 753.

³⁰ *Van Arman v. Byington*, 38 Ill. 443; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559; *McCrary v. Ruddick*, 33 Iowa, 521; *Central Trust Co. v. Bridges*, *supra*.

³¹ *Farmers & Mechanics Bank v. Bank*, 16 N. Y. 125; *Kent v. Tyson*, 20 N. H. 123; *Meador v. Page*, 39 Vt. 306; *Matteson v. Blackmer*, 46 Mich. 393, 9 N. W. 445; *Neibles v. Railway Co.*, 37 Minn. 151, 33 N. W. 322.

³² *Wood v. Brewer*, 66 Ala. 570; *Weston v. Davis*, 24 Me. 374;

broader application, and the one which concerns us most, is to the relation of agency as affecting the rights of third parties with whom the agent has dealt in behalf of the principal.

(b) **Implication from circumstances.** Authority to act as agent will be implied where the circumstances are such as to indicate an intention or willingness to confer the same.³³ Thus, in an action on an accident policy, where it appeared that the insured was injured at a distance from his home, was utterly helpless, and there was no relative or friend near him but his brother, who was caring for him; it was held that authority of the brother to act for him in matters relating to the insurance policy could be implied from the circumstances.³⁴ "In many cases," said the court, "the existence of an agency may be implied or presumed from the words or conduct of the parties, and this, too, although the creation of an agency was not within their immediate contemplation; but this agency is to be limited in its scope and operation to the reasonable and necessary requirements of the case which calls it into being."³⁵ On much the same principle, it has long been held that the master of a ship has implied authority, in face of sudden emergencies, to act as the necessities of the case may require,

Millar v. Cuddy, 43 Mich. 273, 5 N. W. 316; *Garfield v. Peerless Car Co.*, 189 Mass. 395, 75 N. E. 695. Thus, where a person, knowing that services are being performed in his behalf, remains silent and receives the benefits, he impliedly consents to pay for them. *Vilas v. Downer*, 41 Vt. 419; *Weeks v. Holmes*, 12 Cush. (Mass.) 215.

³³ *Lainhart v. Gabbard*, 28 Ky. Law Rep. 105, 89 S. W. 10; *Schneider v. Schneider*, 125 Iowa, 1, 98 N. W. 159; *Hanscom v. Railway Co.*, 53 Minn. 119, 54 N. W. 944.

³⁴ *Sheanon v. Pacific Mut. Ins. Co.*, 83 Wis. 507, 53 N. W. 878.

³⁵ *Sheanon v. Pacific Mut. Ins. Co.*, *supra*.

though in so doing, he exceeds the powers that have been expressly given him.³⁶ Thus, when necessary for the prosecution of a voyage, he may borrow money on the credit of the owner, hypothecate the ship or cargo, or sell a part of the latter;³⁷ and, in the opinion of Story, may even, in case of absolute necessity, sell both the ship and cargo.³⁸ "In the circumstances supposed something must be done," said the court in a leading English admiralty case, "and there is nobody present who has authority to decide what is to be done. The master is invested by presumption of law with authority to give directions on this ground that the owners have no means of expressing their wishes."³⁹ And, it might be added, in view of the fact that unforeseen emergencies are liable at any time to arise, authority in the agent to act, in face of emergencies, for the best interest of the principal may reasonably be implied from the very fact of his appointment. So, where an employee of a railway company is injured in the performance of his duties, it has been held that a conductor, station master or other agent has implied authority to employ a surgeon to attend the injured man.⁴⁰ Implied agencies of the character under dis-

³⁶ *Stearns v. Doe*, 12 Gray (Mass.), 482, 74 Am. Dec. 608; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248.

³⁷ *McCready v. Thorn*, 51 N. Y. 454; *Pratt v. Reed*, 19 How. (U. S.) 359; *Gordon v. Insurance Co.*, 2 Pick. (Mass.) 249.

³⁸ He may, under circumstances of great emergency, acquire a superinduced authority to dispose of it, from the very nature and necessity of the case. The character of agent is forced upon him, not by immediate act or appointment of the owner, but by the general policy of the law. Story on Agency, § 118.

³⁹ *The Hamburg, Br. & L.*, (Eng.) 253.

⁴⁰ *Cincinnati, etc., Ry. Co. v. Davis*, 126 Ind. 99, 25 N. E. 878; *Terre Haute, etc., Ry. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; *Toledo, etc., Ry. Co. v. Mylott*, 6 Ind. App. 438, 33 N. E. 135; *Arkansas, etc., Ry. Co. v. Loughridge*, 65 Ark. 907, 45 S. W. 907.

cussion are sometimes designated agencies of necessity, and will be deemed to have arisen only in exceptional cases. Thus, some of the courts hold that conductors or other subordinate agents of a railway company have no implied authority, under any circumstances, to employ a physician to attend one of its servants injured by its cars.⁴¹

(c) **Implication from act or conduct.** Implication of authority more usually arises from some act or conduct of the person sought to be bound.⁴² Thus, where one, purporting to act as agent for another, repeatedly performs acts which have not been authorized, but the principal acquiesces in their performance, his conduct naturally gives rise to the inference that he wishes the agent to perform other acts of the same kind; and hence may be deemed evidence of intention to vest the agent with requisite authority.⁴³ So, one who permits another to make collections for

Bigham v. Railway Co., 79 Iowa, 534, 44 N. W. 805. The rule has been held not to extend to the case of passengers or trespassers. *Union Pac. Ry. Co. v. Beatty*, 35 Kan. 268, 10 Pac. 845; *Wills v. International, etc., Ry. Co.*, 41 Tex. App. 58, 92 S. W. 273.

⁴¹ *Marquette, etc., Ry. Co. v. Taft*, 28 Mich. 289; *Tucker v. Railway Co.*, 54 Mo. 177.

⁴² *Kent v. Tyson*, 20 N. H. 121; *Anderson v. Supreme Council*, 135 N. Y. 107, 31 N. E. 1092; *Columbia Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061; *Gibson v. Snow Hardware Co.*, 94 Ala. 346, 10 South. 304.

⁴³ *Reynolds v. Collins*, 78 Ala. 94; *Farmers & Mechanics Bank v. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Thompson v. Clay*, 60 Mich. 627, 27 N. W. 699; *Wheeler v. Benton*, 67 Minn. 293, 69 N. W. 927; *Neibles v. Railway Co.*, 37 Minn. 151, 33 N. W. 322. Where the evidence shows that a man's son had authority to sell specific property, such authority may be presumed to continue for a reasonable time. *Hensel v. Maas*, 94 Mich. 563, 54 N. W. 381. But authority to buy lumber one year does not imply existence of like authority the following year. *Green v. Hinkley*, 52 Iowa, 633, 3 N. W. 688.

him is bound by the payments.⁴⁴ Where a son had for years been signing his father's name to notes, with the latter's knowledge and acquiescence, his authority to bind the father will be inferred.⁴⁵ And where a young man had been employed in a store, and during his employment gave orders for goods, corresponded with reference to the same, received payment for goods sold, and the like, of all of which the owner had presumptive knowledge, the latter will be liable for goods ordered by such clerk, suited to the business, though he received the same and converted them to his own use.⁴⁶ "He was suffered to act as general agent," said the court, "both in buying and selling, and the public was, therefore, justified in assuming that he possessed all the powers requisite to a general agent in buying and selling."⁴⁷ A railway company which, with knowledge, allows a person to rent an office on its right of way and post a sign, styling it the office of the company, is liable for ties purchased by such person in its name.⁴⁸ Where a man in charge of a warehouse purchases grain and ships it in the name of the owner of such warehouse, who advances money to him on such shipments, it may be inferred that the person who purchased the grain is agent of the person in whose name it is shipped, and the latter is liable for the grain so purchased.⁴⁹ And so, generally, where a person, for a considerable time, has acted as agent for another in settling obligations and the like, that fact will be sufficient, *prima*

⁴⁴ *Sax v. Drake*, 69 Iowa, 760, 28 N. W. 423; *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762.

⁴⁵ *Matteson v. Blackmer*, 46 Mich. 393, 22 N. W. 253.

⁴⁶ *Thurber v. Anderson*, 83 Ill. 167; *Elsner v. State*, 30 Tex. 524; *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37.

⁴⁷ *Thurber v. Anderson*, *supra*.

⁴⁸ *Florida, etc., Ry. Co. v. Barnedoe*, 81 Ga. 175, 7 S. E. 129.

⁴⁹ *Malburn v. Schreiner*, 49 Ill. 69

facie, to establish his agency.⁵⁰ "From the natural improbability," said the court, "that one should voluntarily, without authority, assume to act for another, settling his obligations for a considerable period of time, and from the fact that such conduct would naturally come to the knowledge of the assumed principal, the fact of agency may be presumed."⁵¹

Authority, however, to act for another will not be implied unless the latter's conduct has been such as reasonably to raise such implication.⁵² The question really is one of fact,—the intention of the party as evidenced by his conduct. Thus, the fact that one of the creditors of a corporation, after it became insolvent, furnished it means with which to carry on its business, does not, in an action against him for materials furnished the corporation, warrant a finding that he was the principal of the corporation, and liable for the price of the materials.⁵³ Nor will the fact that a note is left with a person for convenience of all parties signing it, make such person agent of the payee in procuring the signatures, so as to bind the payee by his statements.⁵⁴ So, possession of an unindorsed bill of lad-

⁵⁰ *Neibles v. Minneapolis, etc., Ry. Co.*, 37 Minn. 151, 33 N. W. 322; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 29 Am. Rep. 43; *Summerville v. Hannibal, etc., Ry. Co.*, 62 Mo. 391; *Baker v. Kansas City, etc., Ry. Co.*, 91 Mo. 79, 3 S. W. 486.

⁵¹ *Neibles v. Railway*, *supra*.

⁵² *Watson v. Race*, 46 Mo. App. 546; *McNamara v. McNamara*, 62 Ga. 200; *Clark v. Dillman*, 108 Mich. 625, 66 N. W. 570; *Tennessee River Transp. Co. v. Kavanaugh*, 101 Ala. 1, 13 South. 283. Evidence that one acted as agent for another in a single transaction will not raise a presumption of authority to act in a different transaction, especially at a different time. *Bartley v. Rhodes* (Tex. Civ. App.), 33 S. W. 604.

⁵³ *Perkins v. Huntington*, 64 Hun. 635, 19 N. Y. Supp. 71.

⁵⁴ *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140.

ing by a person does not raise a presumption that he is agent of the consignor.⁵⁵ Mere possession of a copy of an account does not imply authority to collect the same.⁵⁶ And authority will not be implied from the fact of previous service, where it does not appear that the principal had knowledge of the same, though he may have accepted its benefits.⁵⁷

(d) **Relation of parties.** The existence of relationship between the parties, such as that of husband and wife, or parent and child, does not raise an implication of authority in one to represent the other.⁵⁸ Thus, in the absence of proof that a father was authorized to act for his daughter as her agent to employ a broker to sell her real estate, the relationship is not a ground upon which the agency can be assumed.⁵⁹ So, a wife has no implied authority to draw her husband's money from a savings bank;⁶⁰ and a sale by her of the husband's property, though a chattel for domestic use, such as a sewing machine, would, unless authorized by him, be invalid.⁶¹ The rule would be the same where the husband, without authority, undertakes to act in behalf of

⁵⁵ *Stewart v. Gregory*, 9 N. D. 618, 84 N. W. 553. Delivery of a subscription paper to a person will not of itself raise an implication of authority in him to collect the subscriptions. *Pease v. Warren*, 29 Mich. 9.

⁵⁶ *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232.

⁵⁷ *Cobb v. Hall*, 49 Iowa, 366.

⁵⁸ *Cowell v. Daggett*, 97 Mass. 434; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Sanders v. Brown*, 145 Ala. 665, 39 South. 732; *Francis v. Reeves*, 137 N. C. 269, 49 S. E. 213. The husband of a woman capable of consenting has no authority in law to authorize performance upon her of a surgical operation. *Pratt v. Davis*, 118 Ill. App. 161.

⁵⁹ *Le Count v. Greenley*, 6 N. Y. St. Rep. 91.

⁶⁰ *Allen v. Williamsburg Sav. Bank*, 69 N. Y. 314.

⁶¹ *Wheeler & Wilson Mfg. Co. v. Morgan*, 29 Kan. 371.

his wife.⁶² The existence of such relationship may, of course, be taken into account in determining whether authority has been conferred. Acts or circumstances which might be insufficient to raise an implication of authority where the parties are strangers, would often prove sufficient in view of their close relationship.⁶³ "The husband," says a learned author, "is bound to fulfill the contract of his wife, when it is such a one as wives, according to the usage of the country, commonly make. If a wife would purchase, at a merchant's store, such articles as wives in her rank of life usually purchase, the husband ought to be bound, for it is a fair presumption that she was authorized to do so by her husband. If, however, she were to purchase a ship or a yoke of oxen, no such presumption would arise, for wives do not usually purchase ships or oxen."⁶⁴ But, though the wife may have implied authority to pledge her husband's credit for ordinary household expenses, such authority would usually not extend to the purchase by her of expensive jewelry;⁶⁵ and, so, it has been held that a wife has no implied authority to bind her husband for medical treatment of his farm hands.⁶⁶

§ 51. **Estoppel.** It is the equitable doctrine of estoppel that where a person by words or conduct leads another reasonably to believe that a certain state of facts exists, and to act upon that belief, he will not subsequently be

⁶² *Ayres v. Probasco*, 14 Kan. 141.

⁶³ *Gates v. Brower*, 9 N. Y. 205, 59 Am. Dec. 530; *Dean v. Shreve*, 155 Ill. 650, 40 N. E. 294; *Graff v. Callahan*, 158 Pa. St. 380, 27 Atl. 1009; *Feiner v. Boynton*, 73 N. J. Law, 136, 62 Atl. 420.

⁶⁴ *Reeve on Domestic Relations*, p. 79; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

⁶⁵ *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77.

⁶⁶ *Baker v. Witten*, 1 Okl. 160, 30 Pac. 491.

permitted, as against such other person, to deny that such state of facts actually did exist.⁶⁷ This doctrine of estoppel is incorporated into the law of agency, and hence it is the rule that, though one can not become the agent of another without that other's assent, yet if a person by his conduct—acts, language or silence—knowingly or negligently leads third parties reasonably to believe that another has authority to represent him, and they act upon that belief, such person, as against them, will be estopped to deny the authority of the agent within the scope of the employment which was represented to exist.⁶⁸ Thus, if a merchant has knowledge that his cashier, without authority, is in the habit of indorsing and collecting checks from a bank, but neglects to notify the bank of the want of authority, he will be estopped to deny the same.⁶⁹ And, where one acquiesces in the use of his name by another in carrying on business, places another upon his premises in apparent charge of the business usually conducted there, or stands by and permits another to act or contract in his name, he will not be heard, as against parties misled by his conduct, to deny the apparent authority of the supposed agent.⁷⁰

⁶⁷ Pomeroy on Equity, § 801 et seq.

⁶⁸ *Kirk v. Hamilton*, 102 U. S. 68; *Johnson v. Hurley*, 115 Mo. 513, 22 S. W. 492; *Jordon v. Greig*, 33 Colo. 360, 80 Pac. 1045; *Mt. Morris Bank v. Gorham*, 169 Mass. 519, 48 N. E. 341. The person relying on the apparent authority of the agent must use reasonable care to ascertain the facts. *Ladd v. Grand Isle*, 67 Vt. 172, 31 Atl. 34. And he must act in good faith. *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456.

⁶⁹ *Columbia Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061.

⁷⁰ *Martin v. Webb*, 110 U. S. 7; *Gilbraith v. Lineberger*, 69 N. C. 145; *St. Louis, etc., Co. v. Parker*, 59 Ill. 23; *Johnson v. Investment Co.*, 46 Neb. 480, 64 N. W. 1100; *Fraternal Army of America v. Evans*, 215 Ill. 629, 74 N. E. 689. So where a person has held another out as his agent, he will be estopped, as against parties

So, where a mortgagee permitted an attorney, who negotiated a loan, to retain possession of the note and mortgage after the principal was due, and the mortgagor, with knowledge of that fact, and relying upon the same, made payment to the attorney, the owner was held to be estopped to deny that the attorney possessed the authority which possession of the securities indicated.⁷¹ "The rule," said the court, "comprises two elements: First, possession of the securities by the attorney with consent of the mortgagee; and second, knowledge of such possession on the part of the mortgagor. Mere possession of the securities by the attorney is not sufficient. The mortgagor must have knowledge of the fact; for he could not have been misled or deceived by a fact, the existence of which was unknown to him. It is the appearance of authority to collect, furnished by the custody of the securities, which justifies him in making payment. And it is because the mortgagor acts in reliance upon such appearance, an appearance made possible only by the act of the mortgagee in leaving the securities in the hands of the attorney, that estops the owner from denying the existence of authority in the attorney which such possession indicates."⁷²

Agency by estoppel is not readily distinguishable from agency by implication. "In fact," says Pomeroy, "the principle which underlies the doctrine of the implied au-

who have dealt with such agent, to deny the latter's authority, notwithstanding its revocation, if such parties had no notice thereof. *Hatch v. Coddington*, 95 U. S. 48; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84.

⁷¹*Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456. The fact of possession of a note and deed of trust by an attorney is presumptive enough to justify payment to him. *Whelan v. Reilly*, 61 Mo. 565.

⁷²*Crane v. Gruenewald*, *supra*.

thority of an agent, in most of its applications, and which prevents the principal from denying the authority which, by his conduct, he has held the agent out to the world as possessing, is identically the same principle which constitutes the essence of all equitable estoppels."⁷³ Theoretically, at least, there is this distinction: In cases of implied agency, the implication is an inference from conduct of an intention to confer authority; while in agency by estoppel, such intention is not a factor, but the party's conduct is held to be such as to render it inequitable for him to deny the existence of the agency, though it does not in fact exist. So, practically, it is conceivable that facts which would be sufficient to raise an implication of authority might not be sufficient to create an estoppel; as where the third party, at the time of dealing with the assumed agent, had no knowledge of the conduct of the principal which gives rise to the implication of authority.⁷⁴

§ 52. Acceptance by agent. Since the relation of principal and agent is founded on contract, the same can not be created except by assent of both parties. Hence to constitute one an agent, there must be assent on his part as

⁷³ Pomeroy on Equity, § 801.

⁷⁴ One dealing with an agent may show actual authority in him, such authority as the principal in fact intended to vest in the agent, although such intention is to be shown by acts and conduct, rather than express words, without showing that he knew, when he dealt with the agent, of the acts and conduct from which the intention is to be implied. For the sake of convenience, we must make a distinction between implied authority—that is, such as the principal intends the agent to have—and apparent authority—that is, such as he permits the agent to appear to have. The rule as to apparent authority rests essentially on the doctrine of estoppel. *Columbia Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061.

well as on that of the principal; and an appointment is not effective until accepted by the agent.⁷⁵ This acceptance will be implied from performance of the agency.⁷⁶

⁷⁵ *First Nat. Bank v. Free*, 67 Iowa, 11, 24 N. W. 566; *Beebe v. De Baun*, 8 Ark. 510.

⁷⁶ *George v. Sandell*, 18 La. Ann. 535. Where a joint agency, established by correspondence, is modified by letter, creating a sole agency, which though not accepted in writing, is acted on by the agent, the sole agency is complete. *Mueller v. Bethesda Springs Co.*, 88 Mich. 390, 50 N. W. 319.

CHAPTER V.

RATIFICATION.

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- 63. Effect between principal and third party.
 - (a) In general.
 - (b) Acts.
 - (c) Contracts.
- 64. Effect on agent.

§ 53. In general. An act performed, or a contract entered into, by one person in behalf of another, unless authorized by the latter, expressly or impliedly, is not his act

or contract, and, in the absence of an estoppel, will in no way be binding upon him. One man can not act as agent for another without that other's assent.¹ In accordance with the doctrine to be discussed in the present chapter, however, it will be seen that under certain conditions the assent of a principal to the performance of acts in his behalf by another may be given after as well as before their performance. Broadly stated, it is the doctrine of ratification that any act done, or contract entered into, in behalf of a person by one who, without authority, assumed to act as his agent, may be adopted by such person and made his own, with much the same effect upon all parties as if the act or contract had been originally authorized; the subsequent assent relating back, and, in the main, becoming equivalent to an original authorization.² The doctrine of ratification, it may be added, is applicable either where the act adopted was performed by a stranger, without shadow of authority; or where the acts were those of an agent done in excess of his authority.³

§ 54. What acts or contracts may be ratified. (a) In general. Any act, for the performance of which, a person by precedent authorization could have made himself

^{1873.}
¹ *McGoldrick v. Willitts*, 52 N. Y. 612; *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568.

² *Lowry v. Harris*, 12 Minn. 255; *Fleckner v. Bank*, 8 Wheat. (U. S.) 363; *Cook v. Tullis*, 18 Wall. (U. S.) 332; *U. S. Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. 337. Ratification of an unauthorized agreement relates back to its inception, and, in an action thereon, such ratification need not be pleaded, but may be shown in proof of the agreement. *Long v. Osborn*, 91 Iowa, 160, 59 N. W. 14.

³ *Milligan v. Davis*, 49 Iowa, 126; *Waterson v. Rogers*, 21 Kan. 529; *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441; *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385.

liable; or any contract, made in his behalf, which could have been precedently authorized; may be ratified by such person and made his own with the same effect upon him as though he had originally authorized the same.⁴ An act, for the performance of which a person could not have made himself liable by precedent authorization; or a contract which could not, in the first instance, have been authorized; can not subsequently be ratified; for the reason that ratification relates back and is deemed equivalent to original authorization.⁵ This retroactive authorization, naturally, can not accomplish more than could have been accomplished by precedent authority.⁶

(b) *Contracts.* Many contracts—such as those in contravention of law, good morals, or public policy—are illegal, and can not be validly executed, either personally or by agent.⁷ Such contracts when entered into, without authority, in behalf of another, can not be ratified by him.⁸

⁴ *Borel v. Rollins*, 30 Cal. 408; *McCracken v. San Francisco*, 16 Cal. 591; *Armitage v. Widoe*, 36 Mich. 124; *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380. An exception must be noted in the case of crimes. Post § 54 (c).

⁵ *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Turner v. Phoenix Ins. Co.*, 55 Mich. 236, 21 N. W. 326; *MacFarland v. Helm*, 127 Mo. 327, 29 S. W. 1030.

⁶ *Weston v. Estey*, 22 Colo. 334, 45 Pac. 367; *Sumner v. Conant*, 10 Vt. 9. Thus an agent having no authority to appoint subagents can not ratify the act of one assuming to act as subagent. *Trude v. Anderson*, 10 Mich. 357. It has been held, however, that though an executor can not delegate his power of sale, he could ratify an unauthorized sale, for the reason that ratification would be equivalent to personal exercise of the power. *Lake Shore & M. S. Ry. Co. v. Hutchins*, 37 Ohio St. 282.

⁷ *Bishop on Contracts*, Chap. XVIII.

⁸ *United States v. Grossmayer*, 76 U. S. 72; *Boutelle v. Melendy*, 19 N. H. 196; *State v. Torinus*, 26 Minn. 1, 49 N. W. 259; *Spence v. Cotton Mills*, 115 N. C. 210, 20 S. E. 372.

Thus, a contract made in behalf of another with an alien enemy can not be ratified; ⁹ an agreement to influence legislation, to commit an unlawful or immoral act, or a contract in restraint of trade, could not be ratified by the person in whose behalf the same was made.¹⁰ So, an attempted lease, by an agent, which could not have been originally authorized, can not be made valid by ratification;¹¹ and where a municipal contract is void because made with a company in which members of the council have an interest, the same can not be ratified by a subsequent council, none of whose members has an interest in the company.¹² So, where certain contracts—as those for sale of intoxicating liquor—are expressly declared by statute to be invalid, such contracts can not be precedently authorized and hence can not be ratified.¹³ And the rule would be the same, though at the time of ratification, the statute had been repealed, and such contracts could then be authorized.¹⁴

(c) **Torts.** One who authorizes the commission of a tort is liable in damages for the injury sustained;¹⁵ and

⁹ *United States v. Grossmayer, supra.*

¹⁰ *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Le Tourneux v. Gilliss*, 1 Cal. App. 546, 82 Pac. 627; *Shepardson v. Gillette*, 133 Ind. 125, 31 N. E. 788.

¹¹ *Sanford v. Johnson*, 24 Minn. 172.

¹² *Milford v. Water Co.*, 124 Pa. St. 610, 17 Atl. 185.

¹³ *Buck v. Albee*, 27 Vt. 190; *Melchoir v. McCarty*, 31 Wis. 252; *Niber v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252.

¹⁴ *Hathaway v. Moran*, 44 Me. 67; *Webber v. Howe*, 36 Mich. 150. A contract of a corporation void because not in writing and sealed as required by statute can not be ratified though the statute is subsequently repealed. *Spence v. Cotton Mills*, 115 N. C. 210, 20 S. E. 372. The validity of a contract depends on the law in existence at the time when it was made and it can not be effected by subsequent change of the law. *Murrel v. Jones*, 40 Miss. 565.

¹⁵ *Cooley on Torts*, Chap. XVIII; Post § 117.

this liability may be created, as well by ratification as by precedent authorization.¹⁶ A person, by ratification, may become liable for a wilful trespass, a fraud, or other tort committed by another, without authority, in his behalf;¹⁷ and so where a principal accepts goods wrongfully seized by his agent, with knowledge of the facts, he will be held liable for an unauthorized assault committed by the agent while making the seizure.¹⁸ So, where a person knowingly accepted proceeds of a wrongful sale of goods, stored in his warehouse, he was held liable, on the theory of ratification, for conversion.¹⁹ Acceptance of the fruits of another's wrongful act, with guilty knowledge, may subject a person to liability, regardless of whether the immediate wrongdoer assumed to act as his agent.²⁰ In such case, however, the liability would be based upon a distinct doctrine of the law of torts, not upon that of agency by ratification; and it seems more accurate to maintain that a tort, like other acts, can be ratified by a person only where it was

¹⁶ *Morehouse v. Northrup*, 33 Conn. 380, 89 Am. Dec. 211; *Brown v. Webster City*, 115 Iowa, 511, 88 N. W. 1070; *Crockett Bros. v. Sibley*, 3 Ga. App. 554, 60 S. E. 326. The failure of a corporation to repudiate a letter of its agent which was libelous *per se* will create liability by ratification for the libel. *Pennsylvania Iron Works Co. v. Henry Voght Mach. Co.*, 29 Ky. Law Rep. 861, 96 S. W. 551.

¹⁷ *Exum v. Brister*, 35 Miss. 391; *Byne v. Hatcher*, 75 Ga. 289; *Dunn v. Hartford Ry. Co.*, 43 Conn. 434; *Street v. Sinclair*, 71 Ala. 110.

¹⁸ *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559; *Nims v. Mt. Hermon School*, 160 Mass. 177, 35 N. E. 776.

¹⁹ *Creson v. Ward*, 66 Ark. 209, 49 S. W. 327. Where an agent for sale of land is guilty of deceit and the principal, with knowledge, accepts the benefits of his misrepresentations, he is liable therefor. *Krolk v. Curry*, 148 Mich. 214, 111 N. W. 761.

²⁰ *Randlette v. Judkin*, 77 Me. 114; *Holliday v. Jackson*, 30 Mo. App. 263; *Cooley on Torts*, Chap. V.

committed by one who assumed to act in his behalf or as his agent.²¹ So, of course, where a person makes himself criminally liable by sharing in the fruits of another's crime, the liability arises from commission of an independent criminal act, and is not based upon the theory of ratification.²² There can, indeed, be no ratification of a crime so as to create criminal liability; for the reason that to constitute crime, intent must coexist with the wrongful act. Hence a principal could make himself criminally liable for his agent's act only by prior assent.²³

(d) *Forgery*. Where a signature is not required by law to be personally affixed,²⁴ a person may ratify the unauthorized signing of his name by another.²⁵ It has been seriously contended, however, that a forgery is incapable of ratification, for the reason that the forger does not purport to act in behalf of another, but represents the signature to be the personal one of the party whose name is signed.²⁶ So, it has been held that ratification of a forgery would be against public policy, since its effect would be to

²¹ "He that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment." *Coke's Inst.* *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421; *Beveridge v. Rawson*, 51 Ill. 504; *Allred v. Bray*, 41 Mo. 484; *Russo v. Maresca*, 72 Conn. 51, 43 Atl. 552; *Mattocks v. Young*, 66 Me. 459.

²² *McClain on Criminal Law*, § 209.

²³ *Morse v. State*, 6 Conn. 9; *Com. v. Nichols*, 10 Metc. (Mass.) 259; Post § 122.

²⁴ Ante § 31.

²⁵ *Keim v. O'Reilly*, 54 N. J. Eq. 418, 34 Atl. 1073; *Nye v. Lowry*, 32 Ind. 316; *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880.

²⁶ *Brook v. Hook*, 6 Ex. (Eng.) 89; *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606; *Owsley v. Phillips*, 78 Ky. 517, 39 Am. Rep. 258; *Henry Christian B. & L. Ass'n v. Walton*, 181 Pa. St. 201, 37 Atl. 261.

conceal crime and suppress its prosecution.²⁷ Little weight has been given to the first objection which is ingenious but doubtless too refined; ²⁸ and, on principle, it seems the better doctrine that a person can ratify his forged signature and thus obligate himself by the instrument to which it has been affixed, but such ratification will in no way relieve the forger from liability for his criminal act.²⁹

§ 55. Conditions to ratification. (a) **Assumption of agency.** As indicated in a preceding section, an act performed by one person can be ratified by another only when done in his behalf.³⁰ This rule applies with even greater force to contracts. It is elementary that a stranger to a transaction can not force himself into the position of a party thereto. If A, in his own behalf, deals with B, a third person can not, by ratification, substitute himself for A as a party to the contract. So, if A, in making the contract, assumed to act for C, a stranger to the transaction could not ratify the same. C, however, in whose behalf the contract was made, may ratify it; for the situation, then, merely becomes such as was represented to exist, and B is bound by contract with the very person with whom he thought he was dealing. It is the rule, then, that a person may ratify a contract only when the same was made in his behalf by one who assumed to act as his agent.³¹

²⁷ Henry v. Heeb, *supra*.

²⁸ Greenfield Bank v. Crafts, 4 Allen (Mass.), 447.

²⁹ Wellington v. Jackson, 121 Mass. 157; Casco Bank v. Keene, 53 Me. 103; Livings v. Wiler, 32 Ill. 387; McKenzie v. British Linen Co., 6 App. Cas. (Eng.) 82.

³⁰ Ante § 54 (c.). Where an agent wrongfully pledges his principal's property to secure his own debt, the transaction could not be ratified by the principal, for nothing was done in his behalf. Wycoff, Seaman & Benedict v. Davis, 127 Iowa, 399, 103 N. W. 349.

³¹ Virginia, etc., Coal Co. v. Lambert, 107 Va. 368, 58 S. E. 561;

(b) **Existence and designation of principal.** It is but a corollary of the foregoing rule, that the principal, in whose behalf the contract was made, must have been in existence at the time the same was entered into by the assumed agent.³² Thus, where a promoter of a proposed corporation makes a contract in its behalf, the same can not be ratified by the company after its incorporation.³³ Where, however, the corporation subsequently acts upon the contract and accepts its benefits, liability thereunder will usually be created, but not, strictly, on the doctrine of ratification, but rather on the theory of an independent implied agreement;³⁴ and hence liability will not relate back to the date of the original contract.³⁵ It is a further corollary of the rule under discussion that the principal, in whose behalf the agent assumes to deal, must, in some way, be designated; though the designation need not be specific, but must be sufficient to render the principal capable of ascertainment.³⁶ Thus a policy of insurance taken out on a vessel in behalf of all persons interested, may be ratified by any person who, in fact at the time had an interest in the property.³⁷ And it would make no difference that the intended principal was unknown at the time to the agent.³⁸

Commercial, etc., *Bank v. Jones*, 18 Tex. 811; *Mitchell v. Minnesota Fire Ass'n*, 48 Minn. 278, 51 N. W. 608; *Fellows v. Commissioners*, 36 Barb. (N. Y.) 655; *Ilfeld v. Zeigler*, 40 Colo. 401, 91 Pac. 825.

³² *Scott v. Lord Ebury L. R.*, 2 C. P. (Eng.) 255.

³³ *Abbot v. Hapgood*, 150 Mass. 248, 22 N. E. 907; But, see, *Oakes v. Water Co.*, 143 N. Y. 430, 38 N. E. 461.

³⁴ *Low v. Railway Co.*, 45 N. H. 370; *Bell's Gap Ry. Co. v. Cristy*, 79 Pa. St. 54, 21 Am. Rep. 39; *Paxton Cattle Co. v. Bank*, 21 Neb. 621, 33 N. W. 271.

³⁵ *McArthur v. Printing Co.*, 48 Minn. 319, 51 N. W. 216.

³⁶ *Watson v. Swann*, 11 C. B. (N. S) (Eng.) 756.

³⁷ *Hagedorn v. Oliverson*, 2 M. & S. 485.

³⁸ *Mechem on Agency* § 124.

§ 56. **Who may ratify.** A person may ratify a lawful contract made, in his behalf, by one who assumed to act as his agent, provided that at the time it was entered into he possessed legal capacity to make such a contract, or to authorize its making;³⁹ and provided, further, that at the time of ratification, he still possesses such capacity.⁴⁰ Ratification, as we have seen, relates back and becomes equivalent to precedent authorization,—hence the rule that in order to ratify, a person must have had capacity to authorize. But though relating back, ratification, in reality, is the present giving of power, and necessarily presupposes a present capacity in the giver,—hence the rule that in order to make a contract his own by ratification, a person must, at the time he ratifies it, still be capable of making, or authorizing the making, of the same. Thus, where it is held that an insane person can not authorize the making of a contract by agent, a contract so made, in his behalf, could not be ratified by him, even after restoration to sanity;⁴¹ and the same would be true where a person, after reaching his majority, seeks to ratify a contract made in his behalf during his infancy.⁴² Conversely, a contract made

³⁹ *Armitage v. Widoe*, 36 Mich. 124; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676; *Ironwood Store Co. v. Harrison*, 75 Mich. 197, 42 N. W. 808.

⁴⁰ *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *MacFarland v. Helm*, 127 Mo. 327, 29 S. W. 1030. Thus an administrator after his discharge can not ratify an act done, in behalf of the estate before his discharge. *Upton v. Dennis*, 133 Mich. 238, 94 N. W. 728.

⁴¹ *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Lee v. Morris*, 3 Bush. (Ky.) 210; *Fetrow v. Wiseman*, 40 Ind. 148.

⁴² *Philpot v. Bingham*, 55 Ala. 435; *Lawrence v. McArter*, 10 Ohio, 37; *Armitage v. Widoe*, 36 Mich. 124. The tendency of modern decisions is to hold the appointment of agents by infants and lunatics voidable and not void. According to this doctrine a con-

in behalf of a person without authority, could not be ratified by him, if subsequently he becomes insane.⁴³ So, a contract made in behalf of a married woman could not be ratified by her, though by subsequent enabling acts she was given power to contract;⁴⁴ and a municipal corporation, which is without power to issue bonds, can not validate an issue thereof by ratification, even though power to issue bonds has subsequently been granted.⁴⁵

§ 57. **Manner of ratification.** (a) **In general.** As in the case of precedent authorization, ratification may, with few exceptions, be either verbal or written, or it may be implied from acts or conduct. So, a person's conduct may have been such as to estop him from denying a ratification.

(b) **Ratification of sealed instruments and of contracts required to be in writing.** Since precedent authority to execute a sealed instrument must be given under seal,⁴⁶ and ratification relates back and becomes equivalent to such

tract made in behalf of infants or lunatics could be ratified after attainment of competency. See, ante § 17 and § 21.

⁴³ Only a party having capacity to make the contract can ratify it. Bishop on Contracts, § 848; Cook v. Tullis, 18 Wall. (U. S.) 332.

⁴⁴ Sellars v. Kelly, 45 Miss. 323. The execution by a husband of a lien on crops belonging to his wife being void, she can not ratify on becoming discover. Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597.

⁴⁵ Calhoun v. Millard, 121 N. Y. 69, 24 N. E. 27. An unauthorized act done in behalf of a corporation may be ratified by it, provided such act was within the scope of its corporate power. Lyndeborough Glass Co. v. Glass Co., 111 Mass. 315; Kelesy v. Bank, 69 Pa. 426. So the state may ratify an unauthorized act of a public agent, provided performance of the act is within the constitutional power of the state. State v. Torinus, 26 Minn. 1, 49 N. W. 259; State v. Buttles Ex'r, 3 Ohio St. 309.

⁴⁶ Ante § 46.

authority, it follows that ratification of a sealed instrument, executed in behalf of another, can be ratified only by an instrument under seal.⁴⁷ Such ratification may be effected either by an instrument in terms ratifying the deed; or by a power of attorney, prospective in terms, but dated prior to the execution by the agent of the sealed instrument sought to be ratified.⁴⁸ The rule, however, has been so far modified as to permit a parol ratification by one partner of a sealed instrument executed by another in behalf of the firm;⁴⁹ and in Massachusetts the rule has been entirely abrogated, and it is there held that the execution of a sealed instrument may be ratified by parol.⁵⁰ Where, by statute, authority to execute certain parol contracts is required to be in writing,⁵¹ a doctrine similar to that under discussion applies, and ratification of such contracts must be written.⁵²

(c) **Express oral ratification.** Where not required to be under seal or in writing, as explained in the preceding

⁴⁷ *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Grove v. Hodges*, 55 Pa. St. 504; *Zimpelman v. Keating*, 72 Tex. 318, 12 S. W. 177; *Hayes v. City of Atlanta*, 1 Ga. App. 25, 57 S. E. 1087.

⁴⁸ *Millikin v. Coombs*, 1 Greenl. (Me.) 343, 10 Am. Dec. 70; *Rlgan v. Crain*, 86 Ky. 249, 5 S. W. 561.

⁴⁹ *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; *Peine v. Weber*, 47 Ill. 45.

⁵⁰ *Holbrook v. Chamberlain*, 116 Mass. 155, 17 Am. Rep. 146; *McIntyre v. Park*, 11 Gray (Mass.), 102, 71 Am. Dec. 690. As in the case of original authorization, if the seal is not necessary to the validity of the instrument it may be disregarded and parol ratification will be sufficient. *Adams v. Powers*, 52 Miss. 328; *Worral v. Munn*, 5 N. Y. 229.

⁵¹ Ante § 48.

⁵² *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542; *Hawkins v. McGroarty*, 110 Mo. 550, 19 S. W. 830; *Contra: Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490.

section, any form of words that indicates willingness on the part of a supposed principal to adopt an act or contract will be sufficient evidence of a ratification thereof.⁵³

§ 58. Implied ratification. (a) By affirmative act. Assent to be bound by an unauthorized act or contract may be inferred from conduct.⁵⁴ An act done in recognition of a transaction, with knowledge of the facts, is evidence of intention to ratify the same.⁵⁵ Thus entry upon, and use of land, under an unauthorized lease; or taking possession, under an unauthorized contract of purchase, will amount to ratification of such lease or contract.⁵⁶ So,

⁵³ *Truslow v. Parkersburg Bridge Co.*, 61 W. Va. 628, 57 S. E. 51; *Brown v. Henry*, 172 Mass. 559, 52 N. E. 1073. A power of attorney to do future acts does not amount to a ratification of similar acts already done. *Britt v. Gordon*, 132 Iowa, 431, 108 N. W. 319. So, retaining a salesman after knowledge of his unauthorized act is not evidence of ratification. *Deacon v. Greenfield*, 141 Pa. St. 467, 21 Atl. 650.

⁵⁴ *Western Mfg. Co. v. Cotton*, 31 Ky. Law Rep. 1130, 104 S. W. 758; *Ladenburg, Thalman & Co. v. Beal-Doyle Co.*, 83 Ark. 440, 104 S. W. 145.

⁵⁵ *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441; *Welsh v. Ferd Helm Brewing Co.*, 47 Mo. App. 608; *Brown v. Wilson*, 45 S. C. 519, 23 S. E. 630. The possession by a corporation of a contract signed by its secretary, and the payment of money thereunder by such corporation, is a ratification of the contract. *Wright v. Farmers' Mut. Live Stock Ins. Ass'n*, 96 Iowa, 360, 65 N. W. 308.

⁵⁶ *Ehrmantraut v. Robinson*, 52 Minn. 333, 54 N. W. 188; *Hall v. White*, 123 Pa. St. 95, 16 Atl. 521; *Oregon Ry. Co. v. Oregon R. & Nav. Co.*, 28 Fed. 505; *Johnson v. Land Co.*, 116 N. C. 928, 21 S. E. 28. Acceptance and use of goods purchased without authority ratifies the purchase. *Ketchum v. Verdell*, 42 Ga. 534; *Williams v. Crosby Lumber Co.*, 118 N. C. 928, 24 S. E. 800. The owner of a building, however, is not liable for improvements made under an unauthorized contract, because he afterwards uses them, where they are of such a character that they can not be removed. *Mills v. Berla* (Tex. Civ. App.), 23 S. W. 910.

where an agent, without authority, makes a sale, acceptance of proceeds ratifies the sale;⁵⁷ and the rule would be the same where a principal, knowingly, accepts rent under an unauthorized lease,⁵⁸ or the proceeds of an unauthorized loan or compromise.⁵⁹ As will be explained in a subsequent section, the acts of the principal must be done with knowledge of the facts.⁶⁰ Bringing suit based upon an unauthorized transaction will amount to ratification of it.⁶¹ Thus, an action by the principal to enforce a contract made in his behalf, or to secure from the agent an accounting of the proceeds thereof, will evidence an intention to ratify the contract.⁶²

⁵⁷ *Wallace v. Sawyer*, 90 Ind. 499; *Nicholson v. Doney*, 37 Ill. App. 531; *Akers v. Ray County Bank*, 63 Mo. App. 316; *Deering & Co. v. Bank*, 81 Iowa, 222, 46 N. W. 1117; *Kirkpatrick v. Pease*, 202 Mo. 471, 101 S. W. 651. Appropriation by a principal of the avails of an agency amounts to a ratification of what has been done. *Gaudelupo, etc., Min. Co. v. Beatty (Tenn.)*, 1 S. W. 348.

⁵⁸ *Reynolds v. Davison*, 34 Md. 662; *Burkhard v. Mitchell*, 16 Colo. 376, 26 Pac. 657; *Clark v. Hyatt*, 118 N. Y. 563, 23 N. E. 891.

⁵⁹ *Maddux v. Bevan*, 39 Md. 485; *Taylor v. Ass'n*, 68 Ala. 229; *Miles v. Ogden*, 54 Wis. 573, 12 N. W. 81; *Houghton v. Dodge*, 18 N. Y. Super. Ct. 326; *Orvis v. Wells, Fargo Co.*, 19 C. C. A. 382, 73 Fed. 110.

⁶⁰ Post § 60.

⁶¹ *Smith v. Morse*, 9 Wall. (U. S.) 82; *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. 716; *Baily & Co. v. West Lumber Co.*, 1 Ga. App. 398, 58 S. E. 120.

⁶² *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278; *Warder, Bushnell & Glessner v. Cuthbert*, 99 Iowa, 681, 68 N. W. 917; *Le Grande Nat. Bank v. Blum*, 27 Ore. 215, 41 Pac. 659; *Frank v. Jenkins*, 22 Ohio St. 597. An action against an agent, authorized to purchase land, for the amount of a commission secretly paid him by the vendor, is not such a ratification of the transaction as will discharge the vendor from liability for fraud and deceit by which, with assistance of the agent, the sale was induced. *Barnsdall v. O'Day*, 67 C. C. A. 278, 134 Fed. 828

(b) **By silence.** Ordinarily, an unauthorized act will not bind the person in whose behalf it was performed unless by some affirmative conduct he indicates an intention to adopt it. Hence there usually is no obligation upon a person to dissent from, or repudiate, an unauthorized act or contract.⁶³ Nevertheless, circumstances may be such that failure to dissent clearly gives rise to an inference of acquiescence. And, therefore, in many cases ratification may be implied from mere silence.⁶⁴ Thus, where a person was informed of an unauthorized sale of his property by his agent, and knew that the purchaser was dealing with the same as his own, his failure to dissent from the transaction, within a reasonable time, raised an implication of intention to ratify it.⁶⁵ "Subject to his right to a reasonable opportunity to express his dissent, every additional day and hour of silence, after he became privy to the contract, operates as a tacit acquiescence, and raises the presumption of assent."⁶⁶ So where a principal was informed by his

⁶³ *Brass v. Worth*, 40 Barb. (N. Y.) 648; *Powell's Adm'r v. Henry*, 27 Ala. 612; *Burns v. Kelley*, 41 Miss. 339; *Deane v. Gray Bros. Stone Co.*, 109 Cal. 433, 42 Pac. 443. Mere failure to disavow an agent's act instantly on being apprised thereof is not *ipso facto* a ratification. *Miller v. Stone Co.*, 1 Ill. App. 273.

⁶⁴ *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 96 U. S. 640, 2 Colo. 248; *Breed v. First Nat. Bank*, 4 Colo. 481; *Morse v. Diebold*, 2 Mo. App. 163; *Garland v. Wells*, 15 Neb. 298, 18 N. W. 132; *Shinn v. Hicks*, 68 Tex. 277, 4 S. W. 486; *Wheeler v. Citizens' Bank*, 32 Ky. Law Rep. 939, 107 S. W. 316. Failure to repudiate an unauthorized act of an agent usually amounts to ratification thereof. *Lorie v. Railway Co.*, 32 Fed. 270.

⁶⁵ *Hall v. Harper*, 17 Ill. 82; *Alexander v. Jones*, 64 Iowa, 207, 19 N. W. 913.

⁶⁶ *Bigg v. Stone*, 3 Sm. & Gif. (Eng.) 592; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *Reid v. Alaska Packing Co.*, 47 Ore. 215, 83 Pac. 139. What is a reasonable time to disaffirm an unauthorized sale is a question of fact; a delay of five months in disaffirming

agent that the latter, in his behalf, had instituted suit against a debtor, causing him to be arrested and detained in prison, and the principal made no inquiry as to the ground of arrest and gave no directions for the debtor's discharge, it was held that his inaction in the premises amounted to a ratification.⁶⁷

It is sometimes stated as the rule that where the relation of principal and agent already exists, failure, after knowledge, to repudiate an act of the agent, done in excess of his authority, will be evidence of ratification,⁶⁸ while no such implication can arise from failure to dissent from an unauthorized act of a stranger.⁶⁹ "In general," said the court, in an Illinois case, "where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name by the agent, else he will be bound by the act as having ratified it by implication; but where a stranger, in the name of another, does an unauthorized act, the latter need take no notice of it, although informed of the act thus done in his name, and he shall only be bound by affirmative ratification."⁷⁰ No such hard and fast rule, however, can be adopted. Circumstances may be such that mere silence will justify an inference of intention to ratify the unauthor-

the sale of a car load of flour would be unreasonable. *Holloway v. Arkansas City Milling Co.*, 77 Kan. 76, 93 Pac. 577.

⁶⁷ *Forbes v. Hagman*, 75 Va. 168; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519.

⁶⁸ *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385.

⁶⁹ *Searing v. Butler*, 69 Ill. 575. Should a stranger, without authority, assume to act as agent for another, it would be intolerable if such other would be bound to compensate the interloper for his services unless he gave notice of his dissent. *Kelly v. Phelps*, 57 Wis. 425, 15 N. W. 385.

⁷⁰ *Ward v. Williams*, *supra*.

ized act of a stranger;⁷¹ though, of course, as said by Story, "the presumption is far less strong, and the mere fact of acquiescence may be deemed far less cogent, where no relation of agency exists at the time between the parties."⁷² The intention of the person is the controlling factor, and any conduct, at the best, is but evidence of this intention. The relation of the parties affects merely the weight of the evidence.⁷³

§ 59. **Estoppel.** Many of the cases of implied ratification might be based on the doctrine of estoppel; for if a person by his act or conduct, knowingly or negligently, leads another to believe, and to act upon the belief, that he had authorized a particular act, such person will be estopped to deny such authorization.⁷⁴ In many instances, however, implied ratification might be established, where all the conditions necessary to constitute an estoppel would not be present. The former doctrine, therefore, is not merely an application of the latter.⁷⁵

⁷¹ *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861; *Robbins v. Blanding*, 87 Minn. 246, 91 N. W. 844; *Saveland v. Green*, 40 Wis. 431.

⁷² *Story on Agency*, § 256.

⁷³ *Ladd v. Hindebrant*, 27 Wis. 135, 9 Am. Rep. 445. The prior relations of the parties lend great importance to the fact of silence, but it is a mistake to make the competency of the fact depend on those relations. It is one thing to say that the law will not imply a ratification from silence, and a very different thing to say that silence is a circumstance from which, with others, a jury may not imply it. *Philadelphia, etc., R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128.

⁷⁴ *Vicksburg & M. R. Co. v. Ragdale*, 54 Miss. 200; *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800.

⁷⁵ Thus, a person could probably set up a ratification who has not been prejudiced by delay in disaffirming an unauthorized act.

§ 60. **Knowledge of material facts.** Ratification is but the giving of assent to an unauthorized act or contract, and since it would be impossible to assent to facts of the existence of which one had no knowledge, the rule is established that a person will not be bound by an apparent ratification of an unauthorized transaction, unless he adopts the same with knowledge of all the material facts connected therewith.⁷⁶ So, acts or conduct will give rise to an inference of intention to ratify, only when inconsistent with the existence of a contrary intention. Thus, where a principal authorized the sale of shares of stock, for a stated sum, but instructed his agent to reserve the right to a dividend, and these instructions were violated, acceptance of payment, without knowledge of the fact, would not amount to ratification of unauthorized assignment of the dividend.⁷⁷ Such acceptance is not inconsistent with an intention not to ratify. So, ratification of an unauthorized execution of a note will not bind the principal by an unknown stipulation to pay attorney fees;⁷⁸ and where property has been sold by an agent with an unauthorized warranty, acceptance by the owner of proceeds of the sale, without knowledge of the warranty,

⁷⁶ *Owings v. Hull*, 9 Pet. (U. S.) 607; *Craighead v. Peterson*, 72 N. Y. 279; *Aetna Ins. Co. v. Iron Co.*, 21 Wis. 458; *Sill v. Pate*, 230 Ill. 39, 82 N. E. 356; *Daley v. Iselin*, 218 Pa. St. 515, 67 Atl. 837; *Case v. Hammond Packing Co.*, 105 Mo. App. 168, 79 S. W. 732. Acceptance of a deed by grantees is not a ratification of fraudulent acts of a notary in procuring execution thereof, where it was not shown that the grantees had knowledge of such fraud. *Cason v. Cason*, 116 Tenn. 173, 93 S. W. 89.

⁷⁷ *Wheeler v. Sleigh Co.*, 39 Fed. 347.

⁷⁸ *Brown v. Bramberger*, 110 Ala. 342, 20 South. 114. But where a principal receives and retains a note, he is bound by unauthorized stipulations therein. *Wheeler & Wilson Mfg. Co. v. Aughey*, 144 Pa. St. 398, 22 Atl. 667.

will not necessarily amount to a ratification thereof.⁷⁹ So generally, ratification can never be inferred from acts or declarations, if at the time of doing the acts or making the declarations, the principal had no knowledge that the agent had performed the acts claimed to have been ratified.⁸⁰

In concluding this branch of the subject, it may be stated that where circumstances indicate an intention to adopt an unauthorized act, regardless of the material facts, the principal will be bound by his reckless ratification.⁸¹ He can not escape liability by purposely closing his eyes. Thus where a principal enters into possession under an unauthorized lease, deliberately refraining from ascertaining its terms, he undoubtedly would be bound by all its reasonable provisions.⁸² Where, however, the contract was such as the agent had authority to make, and there was no reason to suppose that he had departed from his instructions, acceptance of its benefits would not indicate an intention to ratify unauthorized terms.⁸³ Ordinary negligence or omission

⁷⁹ *Richmond Trading Co. v. Farquar*, 8 Blackf. (Ind.) 89; *Smith v. Tracy*, 36 N. Y. 79. But see *Phillips-Buttorff Mfg. Co. v. Wild Bros.*, 144 Ala. 545, 39 South 359.

⁸⁰ *Coombs v. Scott*, 12 Allen (Mass.), 493; *Davis v. Talbot*, 137 Ind. 235, 36 N. E. 1098; *Munroe v. Fette*, 1 Cal. App. 333, 82 Pac. 206; *Cowan v. Sargent Mfg. Co.*, 141 Mich. 87, 104 N. W. 377. There can be no ratification of a contract by a party who had no knowledge of its existence. *Wood v. Palmer*, 151 Mich. 30, 115 N. W. 242.

⁸¹ *Jewell Nursery Co. v. State*, 5 S. D. 623, 59 N. W. 1025; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *Heinzerling v. Agen*, 46 Wash. 390, 90 Pac. 262. Where a principal ratifies an act of his agent, knowing that he is ignorant of essential facts, he assumes the risk. *Swisher v. Palmer*, 106 Ill. App. 432.

⁸² *Ehrmantraut v. Robinson*, 52 Minn. 333, 54 N. W. 188.

⁸³ *Roberts v. Rumley*, 58 Iowa, 301, 12 N. W. 323; *Clement v. Young-Shea Amusement Co.*, 70 N. J. Eq. 677, 67 Atl. 82. A prin-

will not, of itself, raise an implication of intention to ratify regardless of facts; such implication arises only in exceptional cases.⁸⁴

§ 61. **Ratification in part.** It is fundamental that an unauthorized act or contract of an agent can not be affirmed in part and disaffirmed in part.⁸⁵ A principal can not adopt just so much of an agent's unauthorized act as would be beneficial to him.⁸⁶ Thus where an agent, without authority, borrowed money for his principal and executed a mortgage to secure the loan, the principal could not ratify the loan and repudiate the mortgage;⁸⁷ so where an agent, by a single contract, agreed to the sale of a mill and articles used in connection therewith, the principal could not affirm the contract, and at the same time assert that the agent had authority to sell only the mill.⁸⁸ The rule applies, of course,

principal may usually assume that his agent has obeyed instructions. In *re Johnson*, 102 Minn. 8, 112 N. W. 894.

⁸⁴ *Murray v. Lumber Co.*, 143 Mass. 250, 9 N. E. 634; *Valley Bank v. Brown*, 9 Ariz. 311, 83 Pac. 362. The principal is not chargeable with information which by diligence he could have acquired, if not wilfully ignorant. *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 51 N. E. 9.

⁸⁵ *Warren v. Hayes*, 74 N. H. 355, 68 Atl. 193; *Shinn v. Guyton & Herrington Mule Co.*, 109 Mo. App. 557, 83 S. W. 1015; *McClure Bros. v. Briggs*, 58 Vt. 82, 2 Atl. 583.

⁸⁶ *Stark v. Starr*, 94 U. S. 477; *McLeod v. Despain*, 49 Ore. 536, 92 Pac. 1088. Where the principal takes the benefits of an unauthorized bargain of his agent, he must adopt the contract as made. *Singer Mfg. Co. v. Christian*, 211 Pa. St. 534, 60 Atl. 1087.

⁸⁷ *Krider v. Western College*, 31 Iowa, 547. So, a party can not retain the benefits of his agent's fraudulent conduct without being charged with the instrumentalities employed to effect the purpose. *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614.

⁸⁸ *Elizabethtown M. & C. Co. v. Elizabethtown Milling Co.*, 13 Ky. Law Rep. 96.

only where the transaction was single or the contract entire. Thus where the owner of lots reserved the right to pass upon sales thereof by an agent, his adoption of a number of sales does not prevent his rejecting others.⁸⁰

§ 62. **Effect of ratification.** (a) **In general.** A ratification once made is irrevocable, and binds the principal as effectually as though he had given precedent authority.⁸⁰ On the theory that ratification relates back,—the doctrine of relation as it is termed—the principal and agent are invested with the same rights and obligations as would have existed had the act ratified been precedently authorized.⁸¹ The doctrine of relation is not pushed so far as to affect intervening rights of strangers,⁸² and, so the situation of third parties with whom the unauthorized agent dealt is not in all cases rendered the same by ratification as it would have been had the agent, in dealing with them, been acting with authority.⁸³

(b) **Intervening rights of strangers.** Rights of strangers which have accrued between the act of the agent and its ratification will not be defeated by application of the doctrine of relation.⁸⁴ Thus, by ratification of a prior unauthorized sale, a principal could not defeat a subse-

⁸⁰ *Burlington, etc., Ry. Co. v. Sherwood*, 62 Iowa, 309, 17 N. W. 564.

⁸⁰ *Johnson v. Hoover*, 72 Ind. 395; *Coffin v. Gephart*, 18 Iowa, 256; *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596; *Russ v. Telfener*, 57 Fed. 973.

⁸¹ Post § 64.

⁸² Post § 62 (b).

⁸³ Post § 63.

⁸⁴ *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Fisk v. Holmes*, 41 Me. 441; *Norton v. Alabama Nat. Bank*, 102 Ala. 420, 14 South. 872.

quent valid sale of the property,⁹⁵ nor intervening incumbrances that have attached thereto.⁹⁶

§ 63. **Effect between principal and third party.** (a) **In general.** From the time of ratification the principal becomes the responsible party and is subject to the same obligations as would have arisen had the unauthorized act or contract been precedently authorized.⁹⁷ Conversely, however, it has been held that the other party to the transaction can not be bound, against his will, by a ratification, unless he has assented to the same.⁹⁸

(b) **Acts.** Ratification, as we have seen, may be of an act or of a contract. In the former case, where the unauthorized act of an agent was of such a nature that it would, if authorized, have entitled the principal to have some act performed by a third person, liability for nonperformance can not be created against such third person by ratification.⁹⁹ Thus an unauthorized notice to quit can not be made binding upon a tenant by subsequent ratification;¹⁰⁰

⁹⁵ *Parmelee v. Simpson*, 5 Wall. (U. S.) 81; *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421.

⁹⁶ *Wood v. McClain*, 7 Ala. 806, 42 Am. Dec. 612; *Pollock v. Cohen*, 32 Ohio St. 514. Thus, where an agent to collect takes a deed in payment, without authority, and the land is later attached by another creditor, the latter's right will not be defeated by a subsequent ratification of the deed. *Kempner v. Rosenthal*, 81 Tex. 12, 16 S. W. 639.

⁹⁷ *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *United States Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. 337.

⁹⁸ *Dodge v. Hopkins*, 14 Wis. 630.

⁹⁹ *Story on Agency*, § 246.

¹⁰⁰ *Brahn v. Forge Co.*, 38 N. J. Law, 74; *Pickard v. Perley*, 45 N. H. 188, 86 Am. Dec. 152. The tenant is entitled to such notice as he could act upon with certainty at the time it was given, and is not bound to submit himself to the hazard whether the landlord will ratify or not. *Right v. Cuthell*, 5 East (Eng.), 491.

so an unauthorized demand, though subsequently ratified, will not be sufficient to support a suit in which demand is necessary;¹⁰¹ and the unauthorized bringing of a suit, usually, can not be ratified.¹⁰² In these cases it would manifestly be unjust to give to ratification the effect of previous authority, since the third person, not knowing whether the act will be ratified, would have to perform at his own risk, and would be without protection were the act of the agent disavowed by the principal.¹⁰³

(c) **Contracts.** Without, apparently, so much reason, the rule has been extended to executory contracts; and according to accepted authority, a principal can not, by ratification of an executory contract, build up affirmative rights against the other party unless the latter acquiesce in the ratification.¹⁰⁴ The obligation of a contract, it is contended, must be mutual,—both parties must be bound or neither. Where an agent acts without authority the principal is not bound, and neither, as a consequence, is the third party. The principal, it is true, by ratification may give his assent to the contract, but this should not operate to bind the other party until he, too, assents. “The principal may, by his subsequent assent, bind himself; but if the contract be executory, he can not bind the other party. The latter

¹⁰¹ Story on Agency, § 247. It has been held, however, that bringing suit on an unauthorized demand will ratify it unless authority to make it had been questioned at the time by the person upon whom it was made. *Ham v. Boody*, 20 N. H. 411, 51 Am. Dec. 235.

¹⁰² *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574. But, see, *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85.

¹⁰³ *Tiffany on Agency*, p. 18.

¹⁰⁴ *Dodge v. Hopkins*, 14 Wis. 630; *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110; *Wilkinson v. Heavenrich*, 58 Mich. 574; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322.

may, if he choose, avail himself of such assent, as against the principal; which if he does, the contract, by virtue of such mutual ratification, becomes mutually obligatory.”¹⁰⁵

A contrary doctrine would in many instances give unfair advantage to a principal, as in a case where he is induced to ratify an unauthorized sale solely because the property has subsequently been destroyed. On principle, however, it would seem that a ratification should bind the third party; for by entering into the contract with the agent, under belief that the principal is the real party, such third person gives his assent in advance to be bound, and ratification makes the assent mutual, on much the same theory that acceptance of an offer creates mutuality of agreement. And after all, so far as the third person is concerned, ratification merely brings into existence a state of facts which he believed to exist at the time he dealt with the agent and entered into the supposed contract. This view of the doctrine has support of some authority.¹⁰⁶

§ 64. Effect on agent. Ratification of an unauthorized act vests the agent with the same rights that would have existed had the act been authorized.¹⁰⁷ He may look to the principal for compensation,¹⁰⁸ and is absolved from re-

¹⁰⁵ *Dodge v Hopkins*, 14 Wis. 630.

¹⁰⁶ *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *McClintock v. Oil Co.*, 146 Pa. St. 144, 23 Atl. 211. See *Rogers v. Kneeland*, 10 Wend. (N. Y.) 218; *Bellinger v. Collins*, 117 Iowa, 173, 90 N. W. 609; *Hill v. McMunn*, 232 Ill. 488, 83 N. E. 963.

¹⁰⁷ *Wilson v. Dame*, 58 N. H. 392; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549.

¹⁰⁸ *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88. Where a real estate agent exceeds his authority in making a sale, upon ratification, the compensation fixed in the original contract of employment controls. *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882.

sponsibility for the unauthorized transaction.¹⁰⁹ Where, however, a principal ratifies an act, done in violation of instructions, merely to avoid or reduce a loss therefrom, the agent would scarcely be heard to claim the benefit of an application of the doctrine of relation.¹¹⁰ Where an agent acts in behalf of another, he warrants his authority to third persons with whom he deals, and if he has no authority would be liable in damages for breach of this warranty.¹¹¹ Ratification, being equivalent to precedent authorization, would relieve the agent from such liability.¹¹²

¹⁰⁹ *Pickett v. Pearson*, 17 Vt. 470; *Hanks v. Drake*, 49 Barb. (N. Y.) 186; *Menkens v. Watson*, 27 Mo. 163. Where an agent sells goods for less than the authorized price, ratification relieves him of liability for the difference. *Hollaway v. Arkansas City Milling Co.*, 77 Kan. 76, 93 Pac. 577.

¹¹⁰ *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; *Walker v. Walker*, 5 Heisk. (Tenn.) 425.

¹¹¹ Post § 137.

¹¹² *Berger's Appeal*, 96 Pa. St. 443. If the unauthorized act was a tort, ratification does not relieve the agent of joint liability. *Richardson v. Kimball*, 28 Me. 463.

CHAPTER VI.

TERMINATION OF AGENCY.

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§ 65. In general. An agency, as we have seen, can be created only by act of the parties, as by appointment and acceptance, ratification, or conduct of the principal which gives rise to an estoppel. The relation may be terminated by voluntary act of either party, or in pursuance of the original agreement between them; and so, upon the occur-

rence of certain conditions, such as the death or insanity of either principal or agent, the relation terminates by operation of law. Stated in general terms, an agency may be terminated: 1, By original agreement; 2, By act of the parties; 3, By operation of law.

§ 66. *By original agreement.* Where under the express or implied terms of appointment, an agency is to endure only for a stated time, or until the happening of a stated event, the expiration of such time, or the happening of such event, will, of course, terminate the relation.¹ Thus, where an agent is appointed for the period of one year, the agency will terminate at the expiration of the year;² and where a person, about to depart on a voyage, appoints an agent to act for him during his absence, the agency terminates upon return of the principal.³ So, where an agent is employed for the performance of a particular act, accomplishment of the purpose of the agency necessarily terminates the relation;⁴ and the effect would be the same where the principal himself performed the act or caused it otherwise to be performed.⁵ Thus, where an agent to sell land, in good faith

¹ *Oregon Mortgage Co. v. American Mortgage Co.*, 35 Fed. 22; *Gundlach v. Fischer*, 59 Ill. 172.

² *Clements v. Macheboeuf*, 92 U. S. 418.

³ *Danby v. Coutts*, L. R. 29 Ch. Div. 500.

⁴ *People v. Manistee County Com'rs*, 40 Mich. 585; *Greening v. Steele*, 122 Mo. 287, 26 S. W. 971. After completion of a transaction, a declaration of an agent is not binding on the principal. *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629, 33 S. E. 878.

⁵ *Ahern v. Baker*, 34 Minn. 98, 24 N. W. 341; *Gilbert v. Holmes*, 64 Ill. 548; *Kelly v. Brennan*, 55 N. J. Eq. 423, 37 Atl. 137. Where the treasurer of a town was authorized to borrow money to adjust a tax and the same was adjusted before he acted, his authority ceased. *Benoit v. Inhabitants of Conway*, 10 Allen (Mass.), 528.

effected the sale thereof, he was not precluded shortly thereafter from himself purchasing the land, since he no longer occupied the relation of agent to the original owner; * and so, where an agent, authorized to sell land, effected a sale, but in the meantime the principal, through another agent, had conveyed the land to a different person, the sale by the first agent was without effect and an action thereunder for breach of contract could not be sustained.⁷ The rule would be the same where the subject matter became extinct, as in the case of the destruction of a ship which an agent had been authorized to sell; for clearly, unless a contrary intention is manifested, a condition is to be implied that the authority shall continue only so long as the ship continues to exist.⁸

§ 67. **By act of the parties.** Except where a power is given for a valuable consideration, a condition to be separately discussed,⁹ the principal may, at will, revoke authority vested in an agent and thus terminate the relation; and the same effect may be accomplished by renunciation of the agency by an agent.

§ 68. **Revocation of authority. (a) In general.** It is elementary that one man can not bind another by act or contract without that other's assent; and such assent, in order to be effective, must exist at the moment the act is performed or the contract is entered into. Hence, though authority has been given an agent to perform an act or make a contract in behalf of a principal, the act or contract

* Moore v. Stone, 40 Iowa, 259; Short v. Millard, 68 Ill. 292.

⁷ Ahern v. Baker, 34 Minn. 98, 24 N. W. 341.

⁸ Story on Agency, § 499.

⁹ Post § 70.

will not bind the principal if the authority has been withdrawn before its execution; for in such a case, assent to be bound would not exist at the moment the act was done or the contract was entered into. At any time before its execution, a principal may revoke authority. The law will not force him against his will into what is essentially a voluntary transaction merely because at a prior time he had indicated a willingness to enter into the same by appointing an agent to represent him. Subject to an exception, to be separately noted,¹⁰ it is the rule, then, that at any time before its execution, a principal may revoke authority vested in an agent and thus terminate the relation; even though he may have contracted with the agent for its longer continuance.¹¹ Thus, authority of an auctioneer, or of a broker, may be revoked at any time before the goods are sold,¹² and a subsequent sale will not be binding on the principal.¹³ Where money is given an agent to pay a debt due a third person, the same may be recalled at any time before it reaches the hand of the creditor;¹⁴ and, so, until acceptance by the principal's creditors of an arrangement whereby an agent is to sell the principal's goods and apply the proceeds

¹⁰ Post § 70.

¹¹ *Blackstone v. Buttermore*, 53 Pa. St. 266; *Willcox & Gibbs Sewing Mach. Co. v. Ewing*, 141 U. S. 627; *Strong v. Buffalo Land Co.*, 203 U. S. 582; *McMahan v. Burns*, 216 Pa. St. 448, 65 Atl. 806; *Phillips v. Howell*, 60 Ga. 411.

¹² *Manser v. Back*, 6 Hare (Eng.), 443; *Hoover v. Perkins Windmill Co.*, 41 Minn. 143, 42 N. W. 866.

¹³ *Brown v. Pforr*, 38 Cal. 550; Story on Agency, § 465.

¹⁴ *Howard College v. Pace*, 15 Ga. 486; *Simonton v. First Nat. Bank*, 24 Minn. 216; *Flaherty v. O'Connor*, 24 R. I. 587, 54 Atl. 376. One who has intrusted an agent with a sum of money to settle a law suit between two others, has the power of revocation until the settlement is complete. *Phillips v. Howell*, 60 Ga. 411.

in payment of certain debts, the authority given the agent is subject to revocation.¹⁵

(b) **Power distinguished from right to revoke.** Where an agent is employed for a stated term, or is given exclusive right to perform an act, revocation of authority may amount to breach of the contract subsisting between principal and agent; and to meet this situation, the authorities distinguish between what they term the power to revoke and the right to revoke.¹⁶ This seems an unnecessary, and may prove a confusing, distinction of words. All that it means is, that though a principal has the power or the right to revoke an authority, such power does not carry with it the right to break, with impunity, a contract with his agent. Hence if a revocation of authority incidentally involves, or results in, the breach of a contract of employment, the principal is liable in damages to his agent for such breach of contract.¹⁷ Whether or not in a particular instance revocation of authority, or discharge of an agent, violates a contract of employment must be determined from construction of such contract; and this phase of the case will be governed by the law of contracts, rather than by rules peculiar to the law of agency.¹⁸

§ 69. **How revocation is effected. (a) As against agent.** The law does not take cognizance of a man's intentions until they have been given expression. Hence revocation of an

¹⁵ *Comley v. Dazian*, 114 N. Y. 161, 21 N. E. 135.

¹⁶ *Mechem on Agency*, § 209.

¹⁷ *Kilpatrick v. Willey*, 197 Mo. 123, 95 S. W. 213; *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491; *Coffin v. Landis*, 46 Pa. St. 426.

¹⁸ *Bishop on Contracts*, § 838. An employment is deemed to be at will unless the contract expressly or by clear implication provides for a fixed term; and so the principal may discharge an

agent's authority is not effective against him until notice of revocation is in some way communicated to him.¹⁹ Any form of words that indicates an intention to revoke will be sufficient.²⁰ Thus, the words "I am very sorry to have to ask you to resign your position" would be a sufficient form of revocation.²¹ So, authority conferred by deed may be revoked by parol.²² Revocation of authority may also be implied from acts or circumstances.²³ Thus, where a second appointment would be clearly incompatible with continuance of the first, a grant of power to another agent to do the same act would amount to revocation of the former agent's authority.²⁴ So, disposition by the principal of the subject matter of the agency would impliedly revoke the same, as where he himself sells property which the agent was authorized to sell.²⁵ And authority to represent a partnership, or the joint owners of land, would be impliedly re-

agent without liability for misconduct or incompetency. See, Mechem on Agency, § 211.

¹⁹ *Jones v. Hodgkins*, 61 Me. 480; *Robertson v. Cloud*, 47 Miss. 208; *Best v. Gunther*, 125 Wis. 518, 104 N. W. 82.

²⁰ *Kelly v. Brennan*, 55 N. J. Eq. 425, 37 Atl. 137. Where an agent to buy wool telegraphed his principal in regard to the purchase of a certain lot, a reply that he had better not take it, revoked his authority to buy. *First Nat. Bank v. Hall*, 8 Mont. 341, 20 Pac. 638.

²¹ *Jones v. Graham, etc., Transp. Co.*, 51 Mich. 539.

²² *Brookshire v. Brookshire*, 30 N. C. 74, 47 Am. Dec. 341.

²³ *Copeland v. Insurance Co.*, 6 Pick. (Mass.) 198; *Chenault v. Quisenberry* (Ky), 57 S. W. 234. Where a person assigned a claim for personal injuries and executed a power to release the same, such power was impliedly revoked by the grantor subsequently commencing suit on the claim. *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730.

²⁴ *Davol v. Quimby*, 11 Allen (Mass.) 208; *Enright v. Beaumont*, 68 Vt. 249, 35 Atl. 57.

²⁵ *Gilbert v. Holmes*, 64 Ill. 548; *Walker v. Denison*, 86 Ill. 142.

voked by dissolution of the partnership, or severance of the joint interest.²⁶

(b) **As against third persons.** Revocation of authority, from the moment of its communication to the agent, terminates the relation between him and the principal, but such revocation will not be effective against third parties, to whom the agent has been held out as having authority, until notice of revocation has been communicated to them.²⁷ This rule rests on the doctrine of estoppel and is applicable only where the elements of estoppel exist. Hence after revocation a principal will be liable only to such persons who having knowledge of the agent's authority dealt with him in good faith upon assumption of its continued existence, and without reasonable cause to believe that the authority had been revoked.²⁸ Except in states where, by statute, revocation of a power to sell land must, like the power itself, be recorded,²⁹ any form of notice, express or implied, that puts third persons on their guard will be sufficient.³⁰ Where an agent has been held out generally to the public

²⁶ *Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377; *Callanan v. Van Vleck*, 36 Barb. (N. Y.) 324; *Schlater v. Winpenny*, 75 Pa. St. 321. Change of a firm's name does not revoke an agency conferred upon the same persons under a different name. *Billingsley v. Dawson*, 27 Iowa, 210.

²⁷ *Southern Life Ins. Co. v. McCain*, 96 U. S. 84; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190; *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. 856. A conveyance by virtue of a power of attorney would be good notwithstanding prior revocation of the power where the vendee had no notice of such revocation. *Hancock v. Byrne*, 35 Ky. 513.

²⁸ *Clafin v. Lenheim*, 66 N. Y. 301; *Packer v. Hinckley Locomotive Works*, 122 Mass. 484.

²⁹ *Gatz v. Improvement Co.*, 27 C. C. A. 305, 82 Fed. 381.

³⁰ *Clafin v. Lenheim*, 66 N. Y. 301; *Tier v. Lampson*, 35 Vt. 179, 82 Am Dec. 634.

as having authority, public notice of its revocation might be necessary to protect the principal³¹ but where the holding out has been less general, only those persons who from personal knowledge of the agent's authority, or from previous dealings with him, would be likely to act on the assumption that such authority still existed, would be entitled to notice of its revocation.³² So, where an agent has been authorized merely to do a particular act, no duty is incumbent upon the principal to give notice of revocation, except, possibly, to a person with whom the agent, to the principal's knowledge, has actually opened negotiations.³³

§ 70. Irrevocable powers. As has been already stated, a principal can revoke the authority of an agent notwithstanding that such revocation involves the breach of a contract of employment.³⁴ The right to continue in the performance of an agency, though secured by a valid contract of employment, is not a vested right of which a person can not be deprived, but merely one for violation of which damages are given by law. Where, however, a man secures, for a valuable consideration, either the property of another, the right to control such property, or to exercise a power incidental to ownership, his interest is vested, and can not be divested by an attempted renunciation of the transaction by other parties thereto. So, generally, where a man in

³¹ *Braswell v. American Ins. Co.*, 75 N. C. 8; *Fellows v. Hartford, etc., Co.*, 38 Conn. 197; *McNeilly v. Insurance Co.*, 66 N. Y. 23.

³² *Lamothe v. St. Louis Dock Co.*, 17 Mo. 204; *Hatch v. Codrington*, 95 U. S. 48; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190.

³³ *Watts v. Kavanaugh*, 35 Vt. 34; *Strachan v. Muxlow*, 24 Wis. 21.

³⁴ *Ante* § 68.

order to secure a benefit, other than mere compensation as agent, pays valuable consideration for the right to exercise powers belonging to another, such right becomes vested in him, and is not subject to revocation by the donor.³⁵ It is the rule, then, that a power given for a valuable consideration to secure a benefit independent of mere compensation as agent, vests in the donee a legal interest in the exercise of the power, and the same can not be revoked at the will of the donor.³⁶ Thus, where a man in order to secure a loan gives another power, in event of default, to sell property belonging to him and to collect the debt from proceeds of the sale, such power could no more be revoked by the donor than could a mortgage given to secure a loan;³⁷ and the rule would be the same where an agent is given authority to collect a debt and out of the proceeds to reimburse himself for money advanced to the principal.³⁸ So, generally, an authority can not be revoked by the grantor where it is given as security,³⁹ or to indemnify a surety against loss.⁴⁰ Nor is it necessary, to render an authority irrevoc-

³⁵ As will be seen in the course of our discussion many powers though irrevocable by the grantor will not survive his death. Post § 73 (c).

³⁶ *Blackstone v. Buttermore*, 53 Pa. St. 266; *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Terwilliger v. Ontario, etc., Ry. Co.*, 149 N. Y. 86, 43 N. E. 432. A power to enter upon and sell land given for a consideration of five dollars, has been held irrevocable. *Montague v. McCarroll*, 15 Utah, 318, 49 Pac. 418.

³⁷ *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Allen v. Davis*, 13 Ark. 28.

³⁸ *Marizou v. Ploche*, 8 Cal. 522; *Hutchins v. Hebbard*, 34 N. Y. 27; *Terwillinger v. Railway Co.*, 149 N. Y. 86, 43 N. E. 432.

³⁹ *Beecher v. Bennett*, 11 Barb. (N. Y.) 380; *Evans v. Fearne*, 16 Ala. 689, 50 Am. Dec. 197; *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 59 N. W. 998.

⁴⁰ *Hynson v. Noland*, 14 Ark. 710.

cable that the interest be vested in the person who is to exercise the power; but the beneficiary may be a third person.⁴¹ Thus, where a debtor authorizes an agent to sell property and out of the proceeds to pay a debt due a third person, the power becomes irrevocable upon the creditor's acceptance of the security.⁴² Mere interest in the execution of an agency, as by way of compensation, is not sufficient. Thus, the fact that an agent to sell land, or to collect money, is to have a percentage of the proceeds as commission does not secure his authority against revocation,⁴³ even though by the terms of his contract of employment it is provided that the authority shall be irrevocable.⁴⁴

§ 71. *Renunciation by agent.* Just as the principal has power to revoke authority, so an agent, at will, may terminate the relation by renunciation;⁴⁵ subject, as in the case of a principal, to liability for damages if the renunciation involves breach of a contract of employment.⁴⁶ The principal is entitled to reasonable notice of renunciation, and may recover damages for any loss sustained through failure

⁴¹ *Kindig v. March*, 15 Ind. 248.

⁴² *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 59 N. W. 998.

⁴³ *Blackstone v. Buttermore*, 53 Pa. St. 266; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Ballard v. Insurance Co.*, 119 N. C. 187, 25 S. E. 956; *McMahan v. Burns*, 216 Pa. 448, 65 Atl. 806. The fact that an agent was entitled to commissions on rents collected would not make his authority irrevocable. *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784.

⁴⁴ *Walker v. Denison*, 86 Ill. 142; *Flanagan v. Brown*, 70 Cal. 254, 11 Pac. 706; *Woods v. Hart*, 50 Neb. 497, 70 N. W. 53.

⁴⁵ *Barrows v. Cushway*, 37 Mich. 481; *Security Trust & Life Ins. Co. v. Ellsworth*, 129 Wis. 349, 109 N. W. 125.

⁴⁶ *United States v. Jarvis*, 2 Ware. 278, Fed. Cas. No. 15,468; *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60, 27 Pac. 238.

to give such notice.⁴⁷ If the conduct of an agent is such as to raise an implication of renunciation, as where he abandons performance of the agency, the principal may act upon the inference thus raised and treat the agency as terminated.⁴⁸

§ 72. **Termination by law.** Subject to certain exceptions that will be properly noted, an agency is terminated by operation of law upon the death, insanity or bankruptcy of either party; by marriage of a principal, where the power is one to sell land; and by the outbreak of war between countries in which the principal and agent respectively reside. These various conditions that operate to terminate an agency will be separately discussed in the succeeding sections.

§ 73. **Death. (a) Of principal.** Except where a power is coupled with an interest, an exception to be separately noted,⁴⁹ the death of a principal instantly revokes all authority vested in an agent.⁵⁰ An agent is but the representative of another, and all acts done, in the capacity of agent, are necessarily done in the name and behalf of another. Upon the death of that other the agent no longer

⁴⁷ The agent can not withdraw himself from his engagement wantonly and without reasonable notice, without responsibility for consequences. *United States v. Jarvis*, *supra*.

⁴⁸ *Stoddard v. Key*, 62 How. Prac. (N. Y.) 137; *Case v. Jennings*, 17 Tex. 661.

⁴⁹ Post § 73 (c).

⁵⁰ *Harper v. Little*, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; *Darr v. Darr*, 59 Iowa, 81, 12 N. W. 765; *Mills v. Smith*, 193 Mass. 11, 78 N. E. 765. Authority is terminated by death of one of several joint principals, or by death of one partner where an agent represents the firm. *Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377; *Griggs v. Swift*, 82 Ga. 392, 9 S. E. 1062.

has a constituent, and acts done in behalf of a non-existent principal are mere nullities. It makes no difference that the death was unknown to the agent and third parties with whom he has dealt; for if at the time of their dealings the principal was actually dead, their lack of knowledge of the fact can not give validity to the transaction.⁵¹

Some of the cases do not follow the rule in its strictest application.⁵² Thus, it has been held that payment of money to the agent of a dead principal, without knowledge of his death, would be binding on his estate;⁵³ and Story has support of judicial authority in saying that the rule does not apply to acts which need not be done in the name of the principal.⁵⁴ But however harsh the rule in strict application may be, it is impossible to escape the logic of the proposition that one man can not act in behalf of another after that other man is dead; and that to involuntarily substitute as principal the heirs of the deceased is to violate the basic principle of agency that one man can not represent another without that other's assent. The rule, therefore, in its strictest application, would seem on principle the better law.⁵⁵

⁵¹ Long v. Thayer, 150 U. S. 520; Lewis v. Kerr, 17 Iowa, 73; ✓ Farmers' Loan & Trust Co. v. Wilson, 139 N. Y. 284, 34 N. E. 784.

⁵² Ish v. Crane, 8 Ohio St. 520; Meinhardt v. Newman, 71 Neb. 532, 99 N. W. 261.

⁵³ Dewesse v. Muff, 57 Neb. 17, 77 N. W. 361; Cassiday v. McKenzie, 4 Watts & Serg. (Pa.) 282.

⁵⁴ Story on Agency, § 496; Dick Ex'r v. Page, 17 Mo. 234. Some of the cases seem to hold that acceptance of payment is not an act done in the name of the principal, but this is disregarding the legal significance of the phrase "in the name of." The doctrine had better be based, as impliedly is done in one case, upon broad grounds of public policy or business necessity. See Meinhardt v. Newman, 71 Neb. 532, 99 N. W. 261.

⁵⁵ Weber v. Bridgman, 113 N. Y. 600, 21 N. E. 985; ✓ Farmers'

(b) **Of agent.** The death of an agent terminates the relation,⁵⁶ and the powers given him can not be exercised by his heirs or administrator unless it be a power coupled with an interest.⁵⁷

(c) **Power coupled with an interest.** We saw in a preceding section that a power given for a valuable consideration can not be revoked by the donor.⁵⁸ Such a power, however, can not survive the death of the donor unless it be accompanied by the grant of such an interest or estate in the subject matter of the power as to admit of its exercise by the donee in his own name and behalf. Clearly, where a donee has no interest in the subject matter of a power, but merely an interest in its execution, he necessarily would have to exercise it in the name, and by the authority, of the donor. But this would be legally impossible after the donor's death.⁵⁹ Where, however, the power is accom-

Loan & Trust Co. v. Wilson, 139 N. Y. 287, 34 N. E. 784; *Long v. Thayer*, 150 U. S. 520. "The instant the constituent dies the estate belongs to his heirs, or devisees, or creditors; and their rights can not be divested or impaired by any act performed by the attorney after the death has happened; the attorney then being a stranger to them and having no control over their property." *Harper v. Little*, 2 Greenl. (Me.) 14, 11 Am. Dec. 25. Failure to promptly notify an agent of the principal's death might, of course, estop the legal representatives to set up the revocation of authority.

⁵⁶ *In re Merrick's Estate*, 8 Watts & Serg. (Pa.) 402; *Adriance v. Rutherford*, 57 Mich. 170, 23 N. W. 718; *Ryder v. Johnston*, 153 Ala. 482, 45 South. 181. So, a joint agency is revoked by death of one of the agents. *Hartford Ins. Co. v. Wilcox*, 57 Ill. 180; *Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377; *Ante* § 27.

⁵⁷ *Collins v. Hopkins*, 7 Iowa, 463; *Merrwin v. Lewis*, 90 Ill. 505.

⁵⁸ *Ante* § 70.

⁵⁹ "The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power; and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a

panied by an interest or estate of such a character as to enable the donee to exercise it in his own name, then the necessity of pronouncing it revoked by death of the donor does not exist, and the courts protect it and permit its exercise after as well as before his death.⁶⁰ Thus, where a mortgage is held to pass legal title, a power of sale therein may be exercised after death of the mortgagor;⁶¹ but such power usually can not be exercised in those states where a mortgage is deemed a mere security passing no legal title.⁶² So, indorsement and delivery of a note for collection passes title in trust, and hence the agent may collect the same after death of the principal.⁶³ But a power to sell property, though given to secure a loan, is revoked by death of the donor unless accompanied by a conveyance or assignment of title.⁶⁴

(d) *Hunt v. Rousmanier*. The distinction laid down in the foregoing subdivision between powers irrevocable case is the act of the principal, to be legally effectual, must be in his name, and must be such an act as the principal himself would be capable of performing. Such a power necessarily ceases with the life of the person making it." Marshall, C. J. in *Hunt v. Rousmanier*.

⁶⁰ *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Houghtaling v. Marvin*, 7 Barb. (N. Y.) 412; *State v. Walker*, 125 U. S. 339; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820.

⁶¹ *Varnum v. Meserve*, 8 Allen (Mass.), 158; *Berry v. Skinner*, 30 Md. 567; *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104; *Harvey v. Smith*, 179 Mass. 592, 61 N. E. 217.

⁶² *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84; *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606. But see *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780.

⁶³ *Moore v. Hall*, 48 Mich. 143; *Boyd v. Corbitt*, 37 Mich. 52.

⁶⁴ *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Fisher v. Southern Loan & Trust Co.*, 138 N. C. 90, 50 S. E. 592; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Taylor v. Burns*, 203 U. S. 120. Thus, power, on default of payment of a loan, to sell debtor's slaves, was held revoked by death. *McGriff v. Portor*, 5 Fla. 373.

by act of the donor and powers irrevocable by death, was drawn by Chief Justice Marshall in the leading case of *Hunt v. Rousmanier*, where a power of sale, given to secure a loan, was declared to be irrevocable by act of the donor, but revoked by his death, where unaccompanied by an assignment of title, and hence not a power "coupled with an interest."⁶⁵ "We hold it clear," said the great Chief Justice, "that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. * * * A power coupled with an interest is a power which accompanies, or is connected with, an interest." *Hunt v. Rousmanier* is still the leading authority in this country and its reasoning has been generally followed. Some confusion has arisen from the fact that here and there authorities apply a single designation to a power irrevocable by the donor and to a power irrevocable by death, calling both indiscriminately,—a power "coupled with an interest."⁶⁶ And, so, where the term is used in the restricted sense adopted by Chief Justice Marshall, there is some conflict as to what constitutes a power "coupled with an interest," as the term is defined in *Hunt v. Rousmanier*. Thus, in a leading New York case it was held that where a power of sale given as security is accompanied by delivery of possession of the property to be sold, it may be deemed a power "coupled with an interest" as the term is defined by Marshall.⁶⁷ So it has been held, in apparent conflict

⁶⁵ *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174.

⁶⁶ *Big Four Wilmington Coal Co. v. Wren*, 115 Ill. App. 331; *Shepard v. McNail*, 122 Mo. App. 418, 99 S. W. 494. See *Terwilliger v. Railway Co.*, 149 N. Y. 86, 43 N. E. 432.

⁶⁷ "As the possession of the property was delivered in connection with this power to dispose of it for security, the power to

with *Hunt v. Rousmanier*, that power to sell goods, or to collect accounts, and apply the proceeds in payment of a debt, is a power "coupled with an interest" and will not be revoked by death of the donor.⁶⁸

In concluding the subject, it may be said that unless the power is "coupled with an interest," as the term is used in *Hunt v. Rousmanier*, it could not be exercised in accordance with its terms after death of the donor, for the reason that its exercise would have to be in the name of the donor. But, nevertheless, where such a power is given as a security, the donee acquires a right analogous to an equitable lien which undoubtedly would be protected by the courts, and enforced by appropriate remedy against the estate of the donor.⁶⁹

§ 74. *Insanity.* (a) *Of principal.* Insanity of a principal, sufficient to incapacitate him from performing legal acts in his own behalf, will, of course, terminate an agency, since a person can do through agent only such acts as he is competent personally to perform.⁷⁰ It is the rule, however, that the contract of an insane person will be valid where made with a person who dealt in good faith and without knowledge of the insanity, provided the contract has been executed, and the parties can not be restored to *statu quo*.⁷¹ This rule would seem applicable to a contract

sell was coupled with an interest in the property thus pledged, and survived." *Knapp v. Alvord*, 10 Paige (N. Y.), 205, 40 Am. Dec. 241.

⁶⁸ *Merry v. Lynch*, 68 Me. 94; *Shepard v. McNail*, 122 Mo. App. 418, 99 S. W. 494; *Kelly v. Bowerman*, 113 Mich. 446, 71 N. W. 836.

⁶⁹ *Knapp v. Alvord*, 10 Paige (N. Y.), 205, 40 Am. Dec. 241; *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 59 N. W. 998.

⁷⁰ *Davis v. Lane*, 10 N. H. 156; *Hill v. Day*, 34 N. J. Law, 150; *Matthiessen, etc., Co. v. McMahon*, 38 N. J. Law, 536.

⁷¹ *Ante* § 17.

made by agent in behalf of a principal who, after creation of the agency, becomes insane.⁷² Where a power is coupled with an interest, so that it can be exercised by the grantee in his own behalf, insanity of the grantor will not revoke the power.⁷³

(b) **Of agent.** Where authority vested in an agent is of a character to imply exercise of sane judgment and discretion—and this practically includes all authority—in-sanity of an agent would undoubtedly terminate an agency.⁷⁴

§ 75. **Bankruptcy.** (a) **Of principal.** Bankruptcy of a principal revokes authority which relates to property of which the principal is divested by the bankruptcy.⁷⁵ This would not include authority coupled with an interest nor a naked power given as a security.⁷⁶

(b) **Of agent.** Since solvency of an agent is usually a factor taken into consideration by a principal in making the appointment, bankruptcy of an agent terminates his authority in all financial matter;⁷⁷ though not necessarily as to mere formal acts.⁷⁸

⁷² *Drew v. Nunn*, 4 Q. B. Div. (Eng.) 661; *Matthiessen, etc., Refining Co. v. McMahon*, 38 N. J. Law, 536; *Davis v. Lane*, 10 N. H. 156; Ante § 17.

⁷³ *Hill's Ex'r v. Day*, 34 N. J. Eq. 150; *Davis v. Lane*, supra.

⁷⁴ "The exercise of sound judgment and discretion would seem to be required in all cases as preliminaries to the due execution of authority." Story on Agency, § 487.

⁷⁵ *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46.

⁷⁶ *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476. Where the owner of shares of stock in a bank delivered his certificate, together with a power of attorney to transfer the same, to secure a note, the power was not revoked by bankruptcy. *Dickinson v. Bank*, 129 Mass. 279, 37 Am. Rep. 351.

⁷⁷ *Audenried v. Betteley*, 8 Allen (Mass.), 302.

⁷⁸ Story on Agency, § 486.

§ 76. **Marriage.** At common law a married woman could not appoint an agent, and hence marriage of a *feme sole* revoked authority of an agent previously appointed by her.⁷⁹ This rule would not apply where disabilities of married women have been removed by statute. Where, however, a deed of conveyance by a married woman must be joined in by her husband, marriage of a *feme sole* will, of course, revoke a power of attorney to sell land. By marriage, both husband and wife acquire an interest in land of the other, which can be divested only by voluntary conveyance. Hence marriage of either a man or woman revokes a power of attorney to the extent of this interest;⁸⁰ if, indeed, it does not amount to entire revocation.⁸¹

§ 77. **War.** Outbreak of war between countries in which the principal and agent respectively reside usually terminates an agency.⁸² An exception exists in the case of an agency to collect debts, where the agent and debtor are in the same country, and the parties assent to the continuance of the agency;⁸³ and it has been held by the Supreme Court of the United States that a power of attorney to sell

⁷⁹ *Judson v. Sierra*, 22 Tex. 365; *Wamhole v. Foote*, 2 Dak. 1, 2 N. W. 239.

⁸⁰ *Joseph v. Fisher*, 122 Ind. 399, 23 N. E. 856.

⁸¹ *Henderson v. Ford*, 46 Tex. 627. The power given before marriage is to convey the entire estate free from any dower right. Since, by marriage the principal loses this power, it would seem, on principle, that the authority given the agent would thereby be revoked in toto.

⁸² *New York Life Ins. Co. v. Davis*, 95 U. S. 425; *Ward v. Smith*, 7 Wall. (U. S.) 447.

⁸³ *Kershaw v. Kelsey*, 100 Mass. 561; *Montgomery v. United States*, 15 Wall. (U. S.) 395. But the money must not be paid with a view to its transmission to the principal during continuance of hostilities. *Kershaw v. Kelsey*, *supra*.

land was not revoked by war, since it was not an agency of a character to involve active or continuous business relations between the parties residing in the belligerent countries. "The mere fact of the breaking out of war," said the court, "does not necessarily and as a matter of law revoke every agency; whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency." ²⁴

²⁴ Williams v. Paine, 169 U. S. 55.

PART II.

EXISTENCE AND EXTENT OF AUTHORITY.

CHAPTER VII.

ESTABLISHMENT OF AUTHORITY.

- § 78. In general.
- 79. Establishment of authority.
 - (a) Agent's declarations.
 - (b) Communications between principal and agent.
 - (c) Oral or implied authority.
 - (d) Ratification and estoppel.
 - (e) Province of court and jury.
- 80. Written authority.
- 81. Ambiguous authority.
- 82. For principal's benefit.
- 83. Slight deviation.
- 84. Severable transaction.
- 85. Public officers.

§ 78. In general. As we have already seen, it is a fundamental principle of the law of agency that one man cannot bind another by act or contract without that other's assent. Hence, in order to establish the fact of the existence of an agency, or of authority in an agent to bind his principal by a particular act or contract, it is necessary to prove that what the agent did was done with the principal's assent, either precedently or subsequently given, expressly

or impliedly; or that the principal's conduct has been such as to estop him to deny the agent's authority. The law indulges no presumptions as to the existence in one man of authority to bind another, except such as reasonably arise from such other's acts or conduct. In short, where one person seeks to hold another by virtue of dealings with the latter's agent, the burden is upon him to establish existence of the agent's authority.¹

§ 79. **Establishment of authority. (a) Agent's declarations.** Existence of authority in an agent can be established only by proof of express or implied assent to its exercise by the principal.² An agent, naturally, cannot confer authority upon himself. Hence declarations of an agent, ordinarily, are not admissible to prove existence of his authority.³ Nor can his authority be established by proof that he acted as agent and claimed, or was reputed, to have the power which he assumed to exercise.⁴ In practice, it would seem, such evidence of necessity must frequently be

¹ *Beal v. Merriam*, 11 Metc. (Mass.) 470; *Clark v. Dillman*, 108 Mich. 625, 66 N. W. 570; *Schmidt v. Shaver*, 196 Ill. 108, 63 N. E. 655. The burden of showing the existence of an agency is upon the party who alleges it. *Jahn v. Kelly*, 58 Ill. App. 570.

² *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568; *Green v. Hinckley*, 52 Iowa, 633, 3 N. W. 688; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190.

³ *McCune v. Badger*, 126 Wis. 186, 105 N. W. 667; *Peck v. Ritchey*, 66 Mo. 114; *Grant v. Humerick*, 123 Iowa, 571, 94 N. W. 510; *Snook v. Lord*, 56 N. Y. 605; *Mallanphy Bank v. Schoot*, 135 Ill. 655, 26 N. E. 640. So, one assuming to act as subagent can not establish his right to represent the principal by his own testimony. *Lucas v. Rader*, 29 Ind. App. 287, 64 N. E. 488.

⁴ *Trowbridge v. Wheeler*, 1 Allen (Mass.) 162; *Perkins v. Stebbins*, 29 Barb. (N. Y.) 523; *North v. Metz*, 57 Mich. 612, 24 N. W. 759; *Edwards v. Dooley*, 120 N. Y. 540, 24 N. E. 827; *Eaton v. Granite State Ass'n*, 89 Me. 58, 35 Atl. 1015.

relied upon to establish the existence of an agency, and under certain circumstances it is competent for that purpose. Thus, declarations of an agent might be admissible when taken in connection with ratification of his acts by the principal;⁵ and where an agency has otherwise been *prima facie* established, declarations of an agent would be admissible as corroborative evidence.⁶ So, where the agent's acts or declarations have been so long continued, or so open and notorious, that they must have come to the notice of the principal, the latter's failure to repudiate them gives rise to an inference of assent to the agent's assumption of authority; and as evidence from which the jury might infer such assent, the acts or declarations of the agent, taken in connection with the principal's apparent acquiescence, would be admissible in evidence.⁷

The agent, of course, may always be called as a witness to testify to the fact of his agency, and where the power was not delegated in writing, may testify as to its nature and extent.⁸ "It is competent," said the court in a Kansas case, "to prove a parol agency and its nature and scope by the testimony of the person who claims to be the agent.

⁵ Robert Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 S. E. 789.

⁶ Singer, etc., Stone Co. v. Hutchinson, 184 Ill. 169, 56 N. E. 353; Foste v. Standard Ins. Co., 34 Ore. 125, 54 Pac. 811; Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 South. 663.

⁷ Bragg v. Boston, etc., Ry. Corp., 9 Allen (Mass.), 54; Best v. Krey, 83 Minn. 32, 85 N. W. 822; Daggett v. Champlain Mfg. Co., 71 Vt. 370, 45 Atl. 755; Black Lick Lumber Co. v. Camp Const. Co., 63 W. Va. 477, 60 S. E. 409.

⁸ Van Sickle v. Keith, 88 Iowa, 9, 55 N. W. 42; Gould v. Norfolk Lead Co., 9 Cush. (Mass.) 338, 57 Am. Dec. 50; State v. Henderson, 86 Mo. App. 482; Lawall v. Groman, 180 Pa. St. 532, 37 Atl. 98; Liddell v. Sahline, 55 Ark. 627, 17 S. W. 705; Reeves v. Bruening, 13 N. D. 157, 100 N. W. 241.

But it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some previous time."⁹

(b) Communications between principal and agent. Following the same doctrine, it is clear that communications between principal and agent in which the latter's authority is expressly or impliedly admitted by the principal, would be competent evidence of the existence of such authority.¹⁰ Thus a letter from principal to agent, or conversations had between them, bearing upon the fact or scope of the agency, would be admissible in evidence.¹¹

(c) Oral and implied authority. Except in special cases,¹² the existence of an agency may be proved by parol.¹³ Where authority was orally given, the fact of its existence may be established by any one who heard the words of the principal.¹⁴ If these are disputed, or their meaning ambiguous, the fact and effect of their utterance would be a question for the jury in solution of the ultimate problem as to what was the intention of the principal.¹⁵ The agent.

⁹ *Howe Mach. Co. v. Clark*, 15 Kan. 492.

¹⁰ *Arthur v. Gard*, 3 Colo. App. 133, 32 Pac. 343.

¹¹ *Rowlands v. Huggins*, 28 Conn. 122. *Slonecker v. Garrett*, 48 Pa. St. 415; *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681, 46 Pac. 738; *Schilling v. Rosenheim*, 30 Ill. App. 81.

¹² Post § 80.

¹³ *Lyon v. Thompson*, 16 Iowa, 62; *Bryer v. Watson*, 16 Me. 261; *Hamm v. Drew*, 83 Tex. 77, 18 S. W. 434.

¹⁴ *Ream v. McEhane*, 50 Kan. 409, 31 Pac. 1075; *Moffet v. Moffet*, 90 Iowa, 442, 57 N. W. 954; *Bartlett v. Sparkman*, 95 Mo. 136, 8 S. W. 406; *Campbell v. Hough* (N. J. Eq.), 68 Atl. 759. If express oral authority is not satisfactorily shown, authority may be implied from facts and circumstances. *Anglo-California Bank v. Cerf*, 149 Cal. 393, 81 Pac. 1081.

¹⁵ *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Iowa,

as we have seen, may testify as to the fact of the agency;¹⁶ and, so, declarations or admissions of the principal, to whomsoever made, which tend to establish the fact of the agency may be introduced in evidence for that purpose.¹⁷

Where authority is sought to be established by implication, primary proof must be made of acts, conduct or circumstances sufficient to give rise to an inference of its delegation.¹⁸ Though wide latitude is allowed in the introduction of any evidence that tends to prove an agency, yet it must be remembered that in the end, authority will be deemed established only where the fact of its existence is a legitimate conclusion from the evidence presented.¹⁹ Proof of facts that might raise an inference of authority to sell a horse would not necessarily be sufficient evidence of authority to sell a house. Thus, evidence that one acted

286; *Hyman v. Waas*, 79 Conn. 251, 64 Atl. 354; *Luckie v. Johnston*, 89 Ga. 321, 15 S. E. 459; *Hawks v. Davis*, 185 Mass. 119, 69 N. E. 1072.

¹⁶ *Armour v. Ross*, 110 Ga. 403, 35 S. E. 787; *O'Leary v. German American Ins. Co.*, 100 Iowa, 390, 69 N. W. 686.

¹⁷ *Horner v. Beasley*, 105 Md. 193, 65 Atl. 820; *Haughton v. Maurer*, 55 Mich. 323, 21 N. W. 426; *Morse v. Diebold*, 2 Mo. App. 163; *Crain v. Jacksonville National Bank*, 114 Ill. 516, 2 N. E. 486.

¹⁸ *Indiana, etc., Ry. Co. v. Adamson*, 114 Ind. 282, 15 N. E. 5; *Stewart v. Cowles*, 67 Minn. 184, 69 N. W. 694; *Plumb v. Curtis*, 66 Conn. 154, 33 Atl. 998; *Sheanon v. Pacific Mut. Life Ins. Co.*, 83 Wis. 507, 53 N. W. 878.

¹⁹ *McNamara v. McNamara*, 62 Ga. 200; *Bickford v. Menler*, 107 N. Y. 400; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *Stratton v. Todd*, 82 Me. 149, 19 Atl. 111. The evidence necessary to prove an implied agency is very different from that required to prove an express agency. In the former case greater latitude must necessarily be allowed in the admission of testimony tending to prove facts and circumstances from which the existence of an agency may be legitimately inferred. *Patterson v. Van Loon*, 186 Pa. St. 367, 40 Atl. 495.

as agent for another in a single transaction would not support a finding that he had authority to bind the principal in other transactions;²⁰ unless the prior authority of the agent was of such comprehensive and continuous character as to place his power to do similar acts beyond question.²¹ So, as we have seen,²² mere possession of an account is not, in itself, proof of authority to collect the same;²³ nor can authority be established by proof of prior exercise of like powers, where it does not appear that the principal had knowledge of the same, though he may have accepted its benefits.²⁴ And, so, while relationship of the parties is a circumstance that may go to the jury, yet the existence of relationship between them does not of itself prove authority in one to represent the other.²⁵ But on the other hand proof that one for a long time openly acted as agent for another, with the latter's apparent consent, would be strong evidence in favor of his authority.²⁶ So,

²⁰ *Green v. Hinkley*, 52 Iowa, 633, 3 N. W. 688; *Collins & Toole v. Crews*, 3 Ga. App. 238, 59 S. E. 727; *Hackett v. Van Frank*, 105 Mo. App. 384, 79 S. W. 1013. Evidence of an isolated transaction occurring a year subsequent to the one in controversy, unaccompanied by evidence of similar acts in the meantime, is too remote and should be excluded. *Bartley v. Rhodes* (Tex. Civ. App.), 33 S. W. 604.

²¹ *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568. Where the authority of an agent is in question, proof of the exercise by him, with knowledge of the principal, of similar authority in like transactions may be material. *Wilber First National Bank v. Ridpath*, 47 Neb. 96, 66 N. W. 37.

²² Ante § 50 (c).

²³ *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232; *Antram v. Thorndell*, 74 Pa. St. 442.

²⁴ *Cobb v. Hall*, 49 Iowa, 366.

²⁵ *Price v. Seydel*, 46 Iowa, 696; *Crawford v. Redus*, 54 Miss. 700; *Broadstreet v. McKamey*, 41 Ind. App. 472, 83 N. E. 773.

²⁶ *Kerslake v. Schoonmaker*, 1 Hun (N. Y.), 436; *Walsh v. Pierce*, 12 Vt. 130; *Hoge v. Turner*, 96 Va. 624, 32 S. E. 291; *Wil-*

it would be competent to show that the principal had authorized the alleged agent to perform similar acts, or enter into like transactions, with other parties;²⁷ or that the agent was habitually in charge of the principal's property and dealt therewith to the latter's knowledge.²⁸ And so, generally, evidence of a previous course of dealing between principal and agent, that tends to establish the latter's authority, may properly go to the jury.²⁹

(d) **Ratification and estoppel.** What has been said in the preceding subdivision as to proof of precedent authority, will apply to the establishment of a ratification.³⁰ In order to establish ratification of an unauthorized act or contract, proof must be made of written or spoken words which reasonably express an intention to adopt the same;³¹ or facts must be shown from which an inference of such intention necessarily arises.³² Thus, as we have seen,³³ proof

Hams v. Mitchell, 17 Mass. 98. Where an agency has been established, it will be presumed to have continued for a reasonable time. *Hensel v. Maas*, 94 Mich. 563, 54 N. W. 381; *Bergner v. Bergner*, 219 Pa. St. 113, 67 Atl. 999.

²⁷ *Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 927; *Fishbaugh v. Spunangle*, 118 Iowa, 337, 92 N. W. 58; *Lough v. Davis*, 35 Wash. 449, 77 Pac. 732.

²⁸ *Kent v. Tyson*, 20 N. H. 121; *White v. Leighton*, 15 Neb. 424, 19 N. W. 478.

²⁹ *Doan v. Duncan*, 17 Ill. 272; *Continental Tobacco Co. v. Campbell*, 25 Ky. Law Rep. 569, 76 S. W. 125; *Dexter v. Berge*, 76 Minn. 216, 78 N. W. 1111.

³⁰ *Burr v. Howard*, 58 Ga. 564. The question of what is a reasonable time in which a principal must object to acts of his agent, or be bound thereby, is one of fact for the jury. *Minnesota Linseed Oil Co. v. Montague*, 59 Iowa, 448, 13 N. W. 438.

³¹ *Stokes v. Mackay*, 140 N. Y. 640, 35 N. E. 786; *Fisher v. Stevens*, 16 Ill. 397.

³² *Lawrence v. Lewis*, 133 Mass. 561; *Heffron v. Armsby*, 61 Mich. 505, 28 N. W. 672.

³³ Ante § 58.

of acceptance of the benefits of an unauthorized transaction raises an inference of intention to ratify,³⁴ provided such acceptance was with knowledge of material facts, and hence inconsistent with an intention not to ratify.³⁵ Thus, proof that a principal recognized and acted upon an unauthorized transaction of his agent would constitute evidence of a ratification.³⁶ So, in establishing ratification of the unauthorized compromise of a law suit, it would be competent to show that shortly thereafter the principal had abandoned the suit;³⁷ and ratification of an unauthorized purchase of property may be inferred from the fact that the principal retained the property and used it for some time.³⁸

So, of course, where an estoppel is relied upon, proof must be made of acts or conduct which were sufficient to justify a belief that an agent possessed the authority which he claimed to exercise.³⁹ Thus, it may be shown that a person placed another in charge of this property with all appearances of having authority to deal therewith;⁴⁰ or that

³⁴ *Reid v. Hibbard*, 6 Wis. 175; *Smith v. Barnard*, 148 N. Y. 420, 42 N. E. 1054; *Dunn v. Ry.*, 43 Conn. 434.

³⁵ *Owings v. Hull*, 9 Pet. (U. S.) 607; *Benecke v. Insurance Co.*, 105 U. S. 355; *Coombs v. Scott*, 12 Allen (Mass.), 493; *Hunt v. Agricultural Works*, 69 Minn. 539, 72 N. W. 813.

³⁶ *Cooper v. Schwartz*, 40 Wis. 54; *Searing v. Butler*, 69 Ill. 575; *Barnes v. Boardman*, 149 Mass. 106, 21 N. E. 308.

³⁷ *Holt v. Cooper*, 41 N. H. 111.

³⁸ *Blood v. La Serena Land Co.*, 113 Cal. 221, 41 Pac. 1017; *Duzan v. Meserve*, 24 Ore. 523, 34 Pac. 548; *Flintel v. Cook*, 88 Wis. 485, 60 N. W. 788.

³⁹ *Walker v. Hannibal, etc., Ry.*, 121 Mo. 575, 26 S. W. 360; *Northwest Thresher Co. v. Eddyville*, 80 Neb. 377, 114 N. W. 291; *Gibson v. Snow Hardware Co.*, 94 Ala. 346, 10 South. 304.

⁴⁰ *Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 927; *Florida, etc., Ry. v. Barnedoe*, 81 Ga. 175, 7 S. E. 129.

the owner of a note allowed another to keep possession of it and to hold himself out as the owner thereof; ⁴¹ or any evidence of conduct that justified the belief in a third party that one assuming to act as agent, in fact had authority, would be competent to establish an estoppel; ⁴² provided, of course, such third person relied in good faith upon the conduct.⁴³

(e) **Province of court and jury.** Where evidence has been produced which tends to establish a disputed agency, the question of its existence or non-existence is usually one of fact that should be left to the determination of the jury under proper instructions from the court; ⁴⁴ and this is true even though the evidence is not full or satisfactory.⁴⁵ As in other cases, it is within the province of the court to determine whether sufficient evidence has been adduced to warrant submission of the issue to the jury; ⁴⁶ and, so, where the facts are undisputed, and are of such a nature that only one reasonable conclusion can be drawn from

⁴¹ *Reed v. Vancleve*, 27 N. J. Law, 352, 72 Am. Dec. 369.

⁴² *Fitzgerald Cotton Oil Co. v. Farmers' Supply Co.*, 3 Ga. App. 212, 59 S. E. 713; *Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045.

⁴³ *Summerville v. Hannibal, etc., Ry. Co.*, 62 Mo. 391; *Karns v. Olney*, 80 Cal. 90, 22 Pac. 57. Estoppel does not arise unless the representations were made under such circumstances that the principal should have expected that they would have been relied on, and unless they were actually relied on in good faith to the injury of an innocent party. *Clark v. Dillman*, 108 Mich. 625, 66 N. W. 570.

⁴⁴ *Fontaine Crossing, etc., Co. v. Rauch*, 117 Mich. 401, 75 N. W. 1063; *Hankinson v. Lombard*, 25 Ill. 468, 79 Am. Dec. 348; *Whittier v. Child*, 174 Mass. 36, 54 N. E. 344; *Berkson v. Kansas City Ry. Co.*, 144 Mo. 211, 45 S. W. 1119.

⁴⁵ *Martin v. Brown*, 75 Ala. 442; *Trundy v. Farrar*, 32 Me. 225; *Glenn v. Savage*, 14 Ore. 567, 13 Pac. 442.

⁴⁶ *Trimble v. Keer Mercantile Co.*, 56 Mo. App. 683; *Lester v. Snyder*, 12 Colo. App. 351, 55 Pac. 613.

them, the question involved becomes one of law and may properly be decided by the court.⁴⁷ But even where the facts are undisputed, the case should go to the jury where they are of such a nature that reasonable minds could draw different conclusions from them.⁴⁸

§ 80. **Written authority.** Where authority of an agent is required by law to be in writing,⁴⁹ proof of its existence can be made only by production of the written power.⁵⁰ So, where a third person deals with an agent, knowing that the latter acts under formal written instructions, he is bound thereby and is limited in the establishment of the agent's authority to proof of the existence and extent of such written authorization.⁵¹ In either event, the written authority can not be contradicted by parol evidence.⁵² This rule, however, does not exclude parol evidence of a subsequent and distinct grant of power, enlarging or varying that previously given, provided the authority thus enlarged or varied is not of a kind that must be conferred in writing.⁵³

⁴⁷ *McClung v. Spotswood*, 19 Ala. 165; *Wilcox v. Hines*, 100 Tenn. 524, 45 S. W. 781.

⁴⁸ *South Bend Toy Co. v. Dakota, etc., Ins. Co.*, 3 S. D. 205, 52 N. W. 866.

⁴⁹ Ante § 46.

⁵⁰ *Waggener v. Waggener*, 19 Ky. 542; *Neal v. Patten*, 40 Ga. 363; *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 85 N. W. 1019.

⁵¹ *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648; *Henry v. Lane*, 62 C. C. A. 625, 128 Fed. 243; *Clafin v. Continental Jersey Works*, 85 Ga. 27, 11 S. E. 721.

⁵² *Pollock v. Cohen*, 32 Ohio St. 514; *Ashley v. Bird*, 1 Mo. 640; *Allis v. Goldsmith*, 22 Minn. 123; *Minnesota Stone Ware Co. v. McCrossen*, 110 Wis. 316, 85 N. W. 1019.

⁵³ *Hartford Fire Insurance Co. v. Wilcox*, 57 Ill. 180; *Magill v. Stoddard*, 70 Wis. 75, 35 N. W. 346. Where an agent's authority

The written power having been produced, or its contents shown, the authority of the agent to do the act for which the principal is sought to be charged is to be determined by the court from a construction of the instrument.⁵⁴ Formal powers of attorney are strictly construed, and, where their terms are clear, will not be extended by implication.⁵⁵ Thus, power to confess judgment at a specified term of court does not import authority to confess judgment at a different term of court;⁵⁶ a power to sell real estate does not include power to mortgage,⁵⁷ nor to sell land subsequently acquired by the principal.⁵⁸ And a general power to represent the principal in all his interests in a given locality does not include authority to embark the principal in a new and different business.⁵⁹ So, where power to do particular acts is followed by general terms of authority, such general terms are restricted to what is necessary to

rests partly in parol and partly in writing, if the parol evidence is conflicting, or the written instructions ambiguous, the scope and extent of the authority may be left to the jury. *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816.

⁵⁴ Where the authority has been conferred in writing, its nature and extent are questions of law for the court. *Claffin v. Continental Jersey Works*, 85 Ga. 27, 11 S. E. 721; *Groscup v. Downey*, 105 Md. 273, 65 Atl. 930; *Pollock v. Cohen*, 32 Ohio St. 514.

⁵⁵ *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Brantley v. Insurance Co.*, 53 Ala. 554; *Golinski v. Allison*, 114 Cal. 458, 46 Pac. 295. If the language used in a power of attorney is so vague and general that the court can not determine the authority conferred, the power is void for uncertainty. *Stafford v. Lick*, 13 Cal. 240.

⁵⁶ *Rankin v. Eakin*, 3 Head (Tenn.), 229.

⁵⁷ *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Jeffrey v. Hursh*, 49 Mich. 31, 12 N. W. 898.

⁵⁸ *Penfold v. Warner*, 96 Mich. 179, 55 N. W. 680.

⁵⁹ *Campbell v. Hastings*, 29 Ark. 512; *Horne v. Ingraham*, 125 Ill. 198, 16 N. E. 868.

performance of the particular acts.⁶⁰ Thus under a power to demand and receive all money due, and to transact all business, the phrase, "transact all business," would be construed to mean such business as was necessary to collection of the money.⁶¹ Where written authority is of informal character, such as letters, memoranda, or telegrams, liberal rules of construction prevail.⁶² In any case, "the object of the parties is to be kept in view, and when the language used will permit, that construction should be adopted which will carry out instead of defeating the purpose of the appointment."⁶³ Thus even in formal powers, the grant of authority will, if possible, be construed to include such incidental powers as are necessary to the proper execution of the agency;⁶⁴ and evidence of all the surrounding circumstances may be considered to aid the court in the proper interpretation of the instrument.⁶⁵

⁶⁰ *White v. Young*, 122 Ga. 330, 51 S. E. 28; *Quay v. Presido, etc.*, Ry. Co., 82 Cal. 1, 22 Pac. 925.

⁶¹ *Hogg v. Snaith*, 1 Taunt. (Eng.) 347; See, also, *Rountree v. Davidson*, 59 Wis. 522, 18 N. W. 518.

⁶² *Merriman v. Fulton*, 29 Tex. 97; *Craighead v. Peterson*, 72 N. Y. 279; *American Bonding Co. v. Ensey*, 105 Md. 211, 65 Atl. 921.

⁶³ *Holladay v. Dally*, 19 Wall. (U. S.) 606; *Long v. Jennings*, 137 Ala. 190, 33 South. 857. If two constructions seem reasonable, one of which would uphold, the other invalidate, the agent's acts, the former construction is, if possible, to be preferred. *Muth v. Goddard*, 28 Mont. 237, 72 Pac. 621.

⁶⁴ *Hartford Ins. Co. v. Willcox*, 57 Ill. 180; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820.

⁶⁵ *Brantley v. Insurance Co.*, 53 Ala. 554; *Taylor v. Harlow*, 11 Barb. (N. Y.) 232; *White v. Furgeson*, 29 Ind. App. 144, 64 N. E. 49; *Townshend v. Shaffer*, 30 W. Va. 176, 3 S. E. 536. The authority conferred must be determined by the circumstances under which the power is given, the person to whom it is given, and all facts surrounding the parties at the time of the execution of

§ 81. **Ambiguous authority.** Where authority has been conferred in terms reasonably susceptible of two different meanings, and the agent and third person, with whom he deals, in good faith adopt one of them, the principal will not be heard to say that he intended a different interpretation of the authority.⁶⁶ The principal must bear the consequence of a departure where the same was due to his failure to make his instructions clear and unambiguous.⁶⁷ This rule would be of infrequent application in the case of formal powers which "are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions which are interpreted most strongly against the writer, especially where they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations."⁶⁸

§ 82. **For principal's benefit.** However broad and general the grant of authority may be, it will be construed, in the absence of expression to the contrary, as giving power to act only for the benefit of the principal and in his behalf;⁶⁹ and not as authorizing the agent to engage in business in his own behalf, or to bind the principal by

the writing. *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 580.

⁶⁶*Winne v. Insurance Co.*, 91 N. Y. 185; *Bessant v. Harris*, 63 N. C. 542; *National Bank v. Merchants' Nat. Bank*, 91 U. S. 92.

⁶⁷*Very v. Levy*, 13 How. (U. S.) 345; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67, 21 N. W. 184.

⁶⁸*Craighead v. Peterson*, 72 N. Y. 279, 23 Am. Rep. 150.

⁶⁹*Adams Express Co. v. Trego*, 35 Md. 47; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *Camden Safe Deposit Co. v. Abbott*, 44 N. J. Law, 257; *Wilson v. Wilson-Rogers*, 181 Pa. St. 80, 37 Atl. 117.

acts done for the benefit of the agent himself, or of third persons.⁷⁰ Thus power to execute bills or notes does not include authority to execute them for the agent's own benefit, or as an accommodation for a stranger.⁷¹

§ 83. **Slight deviations.** Where authority of an agent to act in the matter involved has been established in any of the ways indicated, the fact that he deviated in some particular from instructions will not invalidate the transaction where the deviation was of so slight and immaterial a character as in no way to affect the substantial rights of the principal.⁷²

§ 84. **Severable transaction.** Where an agent exceeds his authority, the authorized part will stand, where the transaction is clearly severable.⁷³ "When a man," says Lord Coke, "doth that which he is authorized to do and more, there it is good for that which is warranted and void for the rest."⁷⁴ Thus where an agent authorized to make a sale, without authority adds warranties, the purchaser may enforce so much of the contract as was within the agent's power to make;⁷⁵ and where an agent authorized

⁷⁰ *Wallace v. Bank*, 1 Ala. 565; *Kean v. Landrum*, 72 S. C. 556, 62 S. E. 421; *Albright v. Atchinson, etc., Ry. Co.*, 137 Iowa, 631, 115 N. W. 219.

⁷¹ *Gullick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728.

⁷² *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516. Where the authority is particular, however, it must be followed.

⁷³ *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Stowell v. Eldred*, 39 Wis. 614; *Moore v. Thompson*, 32 Me. 497.

⁷⁴ Coke, Lit. 258.

⁷⁵ *Vanada v. Hopkins*, 24 Ky. 285, 19 Am. Dec. 92; *Reed v. Seymour*, 24 Minn. 273; *Smith v. Tracy*, 36 N. Y. 79; *Kane v. Sholars*, 41 Tex. Civ. App. 154, 90 S. W. 937. The other party may, of course, refuse to abide by the contract if the principal repudiates the warranty.

to purchase a stated amount of property, orders more than directed, the principal will be liable for the amount which he authorized.⁷⁶ So, the unauthorized affixing of a seal to a contract, not required to be under seal, may be disregarded and the agreement stand as the authorized simple contract.⁷⁷

§ 85. **Public officers.** The authority of a public officer to act in a particular transaction could be established only by showing that power to do the act, or make the contract, was expressly, or by necessary implication, conferred by law.⁷⁸ Here, the authority is a matter of public record, and all persons are bound to take notice whether it exists at all and if so, what is its nature and extent.⁷⁹

⁷⁶ *Gano v. Chicago, etc., Ry.*, 49 Wis. 57, 5 N. W. 45.

⁷⁷ *Morrow v. Higgins*, 29 Ala. 448; *Baum v. Dubois*, 43 Pa. St. 260; *Long v. Hartwell*, 34 N. J. Law, 116; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330.

⁷⁸ *Whiteside v. United States*, 93 U. S. 247; *Mayor of Baltimore v. Eschbach*, 18 Md. 282.

⁷⁹ *State v. Hastings*, 10 Wis. 518; *Hull v. Marshall County*, 12 Iowa, 270; *State v. Hays*, 52 Mo. 578; *Delafield v. State of Illinois*, 26 Wend. (N. Y.) 192.

CHAPTER VIII.

CONSTRUCTION OF AUTHORITY.

- § 86. In general.
- 87. Express authority.
 - (a) Written authority.
 - (b) Oral authority.
- 88. Implied authority.
- 89. Implication as to extent of authority.
 - (a) Medium powers.
 - (b) Power implied from usage.
- 90. Contrary restrictions.
- 91. Apparent authority.
- 92. General and special agents.
- 93. Notice of limitations.
- 94. Summary.

§ 86. *In general.* As explained in the preceding chapter, the existence of an agency may be established by evidence of an express written or oral appointment; or by proof of facts from which such appointment is necessarily inferred. So, acts or conduct may be shown sufficient to estop the alleged principal to deny authority of the agent. Where the fact of an agency—the existence of the main authority—has been established, in any of the ways indicated, the question then arises as to the extent of the agent's power under the grant of authority shown to have been given. Was it broad enough, for instance, to include performance of some collateral act or the making of some incidental agreement? In short, once the existence of an agency has been established, the necessity arises of construing the grant of authority—be it express or implied—

so as to determine the exact extent or limitation of the agent's power. Just as the fact of an agency—the existence of the main power—may be evidenced by express appointment, or may be implied from facts which raise an inference of its existence, so, as we shall now see, the extent of the agent's authority may be expressly prescribed and limited by his principal; or it may be implied from the nature of the agency, or the facts and circumstances of the case.

§ 87. Express authority. (a) Written authority.

Where authority of an agent is required by law to be in writing, or the person dealing with him knows that he acts under written instructions, proof of existence of the agency, as we have seen, can be made only by production of the writing.¹ So, the extent of the agent's authority can be determined only from a construction of the written power.² To bring an act within the scope of the agent's authority, it must appear from a fair construction of the writing that the authority is to be found within the four corners of the instrument, either by express terms or necessary implication.³ In construing the instrument, the object of the parties will be kept in view, and hence, if its language permits, the law will imply authority in the agent to perform

¹ Ante § 80.

² *Bissell v. Terry*, 69 Ill. 184; *Equitable Life Assur. Soc. v. Poe*, 53 Md. 28; *DeRutte v. Muldrow*, 16 Cal. 505. The authority given by a power of attorney is not to be extended beyond the meaning of the terms in which it is expressed. *Brantley v. Southern Life Ins. Co.*, 53 Ala. 554.

³ *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Jeffrey v. Hursh*, 49 Mich. 31, 12 N. W. 898; *Gilbert v. How*, 45 Minn. 121, 47 N. W. 643; *Penfold v. Warner*, 96 Mich. 179, 55 N. W. 680. A power of attorney merely to sell land implies a sale for cash. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540.

such acts as are reasonably necessary to the execution of the main power given;⁴ and, so, evidence of a well established usage would be admissible for the single purpose of aiding the court in a correct interpretation of the instrument.⁵ Where, however, authority of the agent is clearly defined, and its mode of performance definitely prescribed, there exists no occasion for inference or implication.⁶

(b) **Oral authority.** Where an agency is established by proof of express oral appointment, the extent of the agent's authority will, as in the case of written authority, be limited by express restrictions imposed on him by the principal;⁷ and if these amount to explicit directions as to the mode of performance, the extent of the agent's authority will not be broadened by implication.⁸ Although, as we shall presently see, lack of knowledge of such limitations may save the rights of third persons with whom the agent has dealt.⁹

⁴ *Holladay v. Dally*, 19 Wall. (U. S.) 606; *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600; *American Bonding Co. v. Ensey*, 105 Md. 211, 65 Atl. 921; *Posner v. Bayless*, 59 Md. 56. Authority delegated by formal instrument will not be extended beyond what is necessary to carry into effect the power expressly conferred. *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.

⁵ *Heath v. Nutter*, 50 Me. 378; *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671; *Silverman v. Bullock*, 98 Ill. 11.

⁶ Usage may be admissible to explain what is doubtful but never to contradict what is plain. *Gibney v. Curtis*, 61 Md. 192.

⁷ *Baxter v. Lamont*, 60 Ill. 237; *Siebold v. Davis*, 67 Iowa, 560, 25 N. W. 778; *Thornton v. Boyden*, 31 Ill. 200.

⁸ *McClung v. Spotswood*, 19 Ala. 165; *Kane v. Barstow*, 42 Kan. 465, 22 Pac. 588; *Atchison, etc., Ry. v. Watson*, 71 Kan. 696, 81 Pac. 499; *Monson v. Kill*, 144 Ill. 248, 33 N. E. 43; *Cruzan v. Smith*, 41 Ind. 288.

⁹ Post § 91.

§ 88. **Implied authority.** Where existence of the agency itself is implied, the extent of the agent's authority is, of course, left entirely to implication. But just as the fact of the agency is inferred only when the evidence produced reasonably gives rise to that inference,¹⁰ so, only such implication, as to the extent of the authority, will be indulged as the nature of the implied agency clearly warrants.¹¹ Thus, the fact that an agency to lease a house is established by implication, would not justify an inference of authority in the agent to agree to an unusual or unreasonable covenant in the lease; though authority would be implied to make reasonable agreements, such as one for payment of monthly rent in advance, especially if such mode of payment were shown to be a customary practice.¹²

§ 89. **Implication as to extent of authority. (a) Medium powers.** Where existence of an agency has been established by proof of either express or implied appointment; in the absence of express limitations to the contrary, the law will imply authority in the agent to perform such collateral acts, or to make such incidental agreements, as are reasonably necessary to the proper execution of the power shown to have been given.¹³ Though we say that

¹⁰ Ante § 79 (b).

¹¹ Geylin v. DeVilleroi, 2 Houst. (Del.) 311; McAlpine v. Cassidy, 17 Tex. 449; Wilcox v. Railway, 24 Minn. 269; Aldrich v. Wilmarth, 3 S. D. 525, 54 N. W. 811; Graves v. Horton, 38 Minn. 66, 35 N. W. 568.

¹² Post § 89.

¹³ Sprague v. Gillett, 9 Metc. (Mass.) 91; Williams v. Getty, 31 Pa. St. 461, 72 Am. Dec. 757; Hardee v. Hall, 12 Bush. (Ky.) 327; Barnes v. Hannibal, 71 Mo. 449; Dunwoody v. Saunders, 50 Fla. 202, 39 South. 965; Daniel v. Atlantic Coast Line Ry. Co., 136 N. C. 517, 48 S. E. 816; First Nat. Bank v. Dutcher, 128 Iowa, 413, 104 N. W. 497.

the law will imply the existence of these medium powers, such implication is not a conclusion of law, but rather a presumption of fact, or an inference of intention; for where a person confers authority upon an agent, without restriction, the inference is most natural that he intends the agent to exercise some discretion and to perform such acts as are reasonably necessary to the accomplishment of the purpose of the agency.¹⁴ What is reasonably necessary would be a question of fact, depending on the purpose of the agency, and the circumstances of the particular case.¹⁵ Thus, where an agent was authorized to secure the immediate possession of a store room, the jury might be justified in finding that he had implied power to pay a reasonable bonus for possession, if the same could not otherwise be secured;¹⁶ so, an agent authorized to hurry forward goods and to see that there is no delay in shipping them, would undoubtedly have implied power to pay wharfage, due on the goods, to release them from a lien under which they could be held;¹⁷ and an agent authorized to travel about

¹⁴ *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *LeRoy v. Beard*, 8 How. (U. S.) 451.

¹⁵ *Gilchrist v. Pearson*, 70 Miss. 351, 12 South. 333; *Brockway v. Mullin*, 46 N. J. Law, 448, 50 Am. Rep. 442; *Harvey v. Mason City, etc., Ry.*, 126 Iowa, 465, 105 N. W. 958; *Providence Mach. Co. v. Browning*, 72 S. C. 424, 52 S. E. 117; *St. Louis Gunning Adv. Co. v. Wanamaker & Brown*, 115 Mo. App. 270, 90 S. W. 737; *Nielsen v. Northeastern Siberian Co.*, 40 Wash. 194, 82 Pac. 292. The authority to contract so as to bind the principal is limited to the usual and ordinary means of accomplishing the business intrusted to the agent. *Williams v. Getty*, 31 Pa. St. 461, 72 Am. Dec. 757.

¹⁶ Provided the principal knew at the time of appointment that such bonus would probably be demanded. *Shackman v. Little*, 87 Ind. 181.

¹⁷ *Robison v. Iron Co.*, 39 Hun (N. Y.), 634. An agent selling furnaces for specific use, to be shipped by vendor in detached parts, has implied authority to contract for putting them to-

the country to sell goods, would ordinarily be held to have implied authority to hire a horse to enable him to go from place to place.¹⁸ Power to collect money might be of such a general character as to warrant an inference of authority to sue upon a claim and cause execution to issue;¹⁹ and power to bring suit would imply authority to employ counsel to conduct the same.²⁰ An agent authorized to receive and sell certain goods and to pay himself a debt from the proceeds would have implied authority to bring an action against a person wrongfully withholding possession;²¹ and an attorney authorized by one of the parties to an arbitration to pay the amount awarded against him, and to do what is necessary in the matter, would have implied power to execute a release required by the award.²² So, an agent authorized to secure subscriptions to a stock company, formed for the purpose of controlling certain land, would have implied power to make representations as to the location and value of the land;²³ and an agent

gether and placing them in the building where they are to be used. *Boynton Furnace Co. v. Clark*, 42 Minn. 335, 44 N. W. 121.

¹⁸ *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516.

¹⁹ *McMinn v. Richtmyer*, 3 Hill (N. Y.), 236; *Bush v. Miller*, 13 Barb. (N. Y.) 481; *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216; *Moore v. Hall*, 48 Mich. 145, 11 N. W. 844.

²⁰ *Buckland v. Conway*, 16 Mass. 396.

²¹ *Curtis v. Barclay*, 7 D. & R. (Eng.) 539, 5 B. & C. 141; *Arden v. Soileau*, 16 La. 28.

²² *Dawson v. Lawley*, 4 Esp. (Eng.) 65. Authority of an agent to settle a claim does not imply authority to submit the same to arbitration. *Huber v. Zimmerman*, 21 Ala. 488, 56 Am. Dec. 255. Nor will authority to submit to arbitration imply power to confirm the award. *Bullitt v. Musgrave*, 3 Gill. (Md.) 31.

²³ *Sandford v. Handy*, 23 Wend. (N. Y.) 260. So, an agent empowered to employ a real estate broker to sell land, is authorized to give the broker a description of it. *Griswold v. Gebble*, 126 Pa. St. 353, 17 Atl. 673.

empowered to enter into a contract, clearly, has authority to sign a memorandum to satisfy the statute of frauds.²⁴ Further examples of medium or incidental powers, implied from the nature of the agency, will be given in a succeeding chapter.²⁵

(b) Power implied from usage. Just as authority to exercise medium powers is implied from the fact of unrestricted appointment, so, in the absence of direction to the contrary, an implication arises of authority in an agent to act in accordance with well established usages of the business for which he was engaged.²⁶ If the usage is established, the principal may be presumed to know of it,²⁷ and his failure to instruct the agent otherwise, implies consent to abide by the same.²⁸ Thus a broker employed to transact business in a particular place, has implied authority to act in accordance with the business usages of that place;²⁹ and if a member of a stock exchange, he has implied authority to buy and sell in accordance with the rules or usages of such exchange.³⁰ So, an agent to sell prop-

²⁴ *Johnson v. Dodge*, 17 Ill. 433; *Kelm v. Lindley* (N. J. Eq.), 30 Atl. 1063.

²⁵ Post, Chap. IX.

²⁶ *Upton v. County Mills*, 11 Cush. (Mass.) 589, 59 Am. Dec. 163; *Sumner v. Stewart*, 69 Pa. St. 321; *Kraft v. Fancher*, 44 Md. 204; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550.

²⁷ *Guesnard v. Railway Co.*, 76 Ala. 453; *Bailey v. Bensley*, 87 Ill. 556; *Hibbard v. Peek*, 75 Wis. 619, 44 N. W. 641; *Milwaukee, etc., Inv. Co. v. Johnston*, 35 Neb. 554, 53 N. W. 475. If the usage was a local and particular one, the principal may show that he did not know of it. *Walls v. Bailey*, 49 N. Y. 464; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383.

²⁸ Story on Agency, § 96.

²⁹ *Bailey v. Bensley*, 87 Ill. 556; *White v. Fuller*, 67 Barb. (N. Y.) 267; *Smythe v. Parsons*, 37 Kan. 79, 14 Pac. 444.

erty has implied power to make such warranties as are usually and ordinarily made in sales of like character at the same time and place.³¹ Thus, where it was an established usage of the New York stock exchange that a warranty of commercial character should accompany sales of promissory notes, an agent authorized to sell such paper, was held to have implied authority to make such warranty;³² and where it was the custom in ordering goods, not present for inspection, to require a warranty of their quality, an agent authorized to make a sale, would have implied power to bind his principal by such warranty.³³ So, where sales of machines or implements are usually accompanied by warranty of fitness, an agent authorized to make such sales, has implied authority to give the usual warranty;³⁴ and he may also bind his principal by an agreement to sell upon trial, with privilege of returning if unsatisfactory, where implements of like character are customarily sold upon such conditions.³⁵

§ 90. **Contrary restrictions.** Where the principal has expressly imposed restrictions to the contrary, no implication could arise of authority to exercise medium powers,

³⁰*Ahern v. Goodspeed*, 72 N. Y. 108; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950; *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874.

³¹*Smith v. Tracy*, 36 N. Y. 82; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550; *Decker v. Fredericks*, 47 N. J. Law, 469; *Morris v. Bowen*, 52 N. H. 416; *Applegate v. Moffitt*, 60 Ind. 104.

³²*Ahern v. Goodspeed*, 72 N. Y. 108.

³³*Talmdge v. Bierhause*, 103 Ind. 270, 2 N. E. 716.

³⁴*McCormick v. Kelly*, 28 Minn. 135, 9 N. W. 675.

³⁵*Deering v. Thom*, 29 Minn. 120; *Oster v. Mickley*, 35 Minn. 245. Having sold upon condition that if the machine does not prove satisfactory, the purchaser shall return it, the agent may waive such return. *Pitsinowsky v. Beardsley*, 37 Iowa, 9.

or to execute the agency in accordance with even well established usage. There can be no implication of authority contrary to express limitations.³⁶ Where, however, such express restrictions are not known to a third person with whom the agent deals, he ordinarily may assume that the agent has such authority as is usually possessed by agents of like character, and may bind the principal accordingly. In such case the agent is said to have acted within the scope of his apparent authority.³⁷

§ 91. **Apparent authority.** The doctrine of apparent authority may be said to be based on that of estoppel, though cases might arise in which the doctrine would be applied where, strictly, all the elements of estoppel did not concur.³⁸ Where a person holds another out as his agent, the inference, as we have seen, arises that such agent has authority to act in accordance with well established usage,

³⁶ *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Wood, etc., Mach. Co. v. Crow*, 70 Iowa, 340, 30 N. W. 609.

³⁷ *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722. If a principal holds out his agent as having a greater than his real authority, third persons dealing with him, under this mistaken belief, can hold the principal to the extent of the apparent authority. *Dodge v. McDonnell*, 14 Wis. 553; Post § 91.

³⁸ Thus, the third party need not show that at the time of dealing with an agent he knew of the existence of the usage; and hence could not be said to have to establish that he relied on the agent's authority to act in accordance therewith. So, the principal's representation of his agent's actual authority need not have come to the third party's notice; the latter may take a chance as to the existence of the agency and still hold the principal to acts within the apparent scope of the agent's authority, if it turns out that there really was an agency. The doctrine of apparent authority, therefore, is not merely an application of technical estoppel.

and to perform such acts as are necessary to the accomplishment of the agency.³⁹ This inference, of course, could not be said to arise in the face of contrary instructions. Nevertheless, it will be indulged in favor of third persons who dealt in good faith with the agent without knowledge of the limitation upon his power; or rather, as against such persons, the principal will be estopped to set up such undisclosed limitation.⁴⁰ Where a man, therefore, appoints an agent and fails to disclose unusual restrictions upon his authority, innocent third persons, dealing with him, may assume that the agent has such power as is ordinarily possessed by agents of like character, and which would have been possessed by this particular agent in the absence of such unusual restrictions.⁴¹ Within the scope of this, his apparent authority, the agent may bind the principal; and the scope of his apparent authority will be coextensive with what would have been the scope of his actual implied

³⁹ Ante § 89.

⁴⁰ *Aldrich v. Wilmarth*, 3 S. D. 525, 54 N. W. 811; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Byrne v. Packing Co.*, 137 Mass. 313; *Rathburn v. Snow*, 123 N. Y. 343, 25 N. E. 379; *Trainer v. Morison*, 78 Me. 160, 3 Atl. 185; *Lister v. Allen*, 31 Md. 542, 100 Am. Dec. 78; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190; *Fatman v. Leet*, 41 Ind. 133; *Baker v. Produce Co.*, 113 Mich. 533, 71 N. W. 866; *Reynolds v. Chicago, etc., Ry. Co.*, 114 Mo. App. 670, 90 S. W. 100.

⁴¹ *Brooke v. New York, etc., Ry. Co.*, 108 Pa. St. 529, 1 Atl. 206; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Williams v. Getty*, 31 Pa. St. 461, 72 Am. Dec. 757; *Bently v. Doggett*, 51 Wis. 224, 8 N. W. 155; *Oberne v. Burke*, 30 Neb. 581, 46 N. W. 838; *Hayward Lumber Co. v. Cox* (Tex. Civ. App.), 104 S. W. 403; *Grand Rapids Electric Co. v. Walsh Mfg. Co.*, 142 Mich. 4, 105 N. W. 1. The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he possesses. *Brown v. Eno*, 48 Neb. 538, 67 N. W. 434.

authority had there been an absence of contrary limitations. "Every agency," said the court in a Minnesota case, "carries with it, or includes in it, the authority to do whatever is usual and necessary to carry into effect the main power; and the principal can not restrict his liability for acts of the agent within the apparent scope of his authority by private instructions not communicated to those with whom he deals."⁴²

Thus, a principal is bound by a warranty given by an agent, authorized to make a sale, notwithstanding contrary instructions, where the warranty was a customary one, and the buyer was unaware of the unusual limitation on the agent's power.⁴³ So, where an agent was authorized to travel about the country to sell goods, he would have implied power to hire a conveyance to go from place to place, and hence the principal would be liable to a liveryman who furnished a conveyance, although, unknown to the liveryman, the agent had been provided with money for this purpose and forbidden to pledge his principal's credit.⁴⁴ "From the nature of the business required to be done by their agent," said the court, "the defendants held out to those who might have occasion to deal with him that he had the right to contract for use of teams and carriages necessary and convenient for doing such business, in the name of the principals, if he saw fit, in the way such service is

⁴² *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840. The creation of an agency clothes the agent with such authority as is proper and necessary to effectuate its purpose. *Kearns v. Nickse*, 80 Conn. 23, 66 Atl. 779.

⁴³ *Hayner v. Churchill*, 29 Mo. App. 676; *Boothby v. Scales*, 27 Wis. 636; *Stewart v. Cowles*, 67 Minn. 184, 69 N. W. 695; *Furneaux v. Esterly*, 36 Kan. 539, 13 Pac. 824.

⁴⁴ *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155; *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516.

usually contracted for.”⁴⁵ And so, where an agent was authorized to sell goods on commission, and it was a usual incident to such power to fix the terms of sale, including the mode of delivery, and the time and manner of payment; and the agent contrary to instructions sold goods on credit, which were expressed by the principal to the buyer marked C. O. D., the expressman, having no knowledge of the agent’s want of authority, was held to be justified in releasing the goods, upon the agent’s order, without payment. “The agent,” said the court, “was apparently clothed with authority to sell the plaintiff’s goods, for cash or on credit, as he might think proper; and this being so, he must be regarded, in respect to third persons, as the plaintiff’s general agent whose authority would not be limited by instructions not brought to the notice of such third persons. As the agent, then, in respect to third persons, had power to sell on credit, the authority to control the delivery would necessarily come within the scope of his agency; and we think his order to the defendant would justify a delivery of the goods without payment, unless he had notice of the agent’s want of authority. As to him the agent’s apparent authority was real authority.”⁴⁶

§ 92. General and special agents. Liability of a principal for acts done within the apparent, though beyond the actual, scope of his agent’s authority, is so far based upon the doctrine of estoppel as to arise only where third persons were justified in relying upon the agent’s apparent authority, and where responsibility for the creation of such appearance of authority can be traced ultimately to some

⁴⁵ Bentley v. Doggett, *supra*.

⁴⁶ Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45.

act or omission of the principal.⁴⁷ If third persons have not been misled by conduct of the principal; or if they knew, or ought to have known, of limitations upon the agent's powers, they can not bind the principal by acts done beyond the actual scope of the agent's authority.⁴⁸ In application of this principle, many authorities have been led to lay down the broad proposition that the doctrine of apparent authority can arise only in the case of a general agent; since, it is maintained, when a man appoints a special agent he holds him out merely as possessing such power as has been actually and specifically given; and hence there is no ground for inference as to the nature or extent of that

⁴⁷ *Kane v. Barstow*, 42 Kan. 465, 22 Pac. 588; *Aldrich v. Willmarth*, 3 S. D. 525, 54 N. W. 811; *Brockway v. Mullin*, 46 N. J. Law, 448, 50 Am. Rep. 442; *Briggs v. Taylor*, 35 Vt. 57; *Fred W. Wolf Co. v. Galbraith*, 39 Tex. Civ. App. 351, 87 S. W. 390. A purchase of goods from, and payment to, one who had formerly been authorized by the owner to solicit orders, but never held out as authorized to sell, confers no right on the purchaser. *Abrahams v. Weiller*, 87 Ill. 179. The principal is liable only where he has clothed the agent with the appearance of authority to act in the particular case. *Wilcox v. Routh*, 17 Miss. 476. An agent pursuing the method in which he usually transacts business for the principal may be deemed clothed with necessary authority. *Brooke v. New York, etc., Ry. Co.*, 108 Pa. St. 529, 1 Atl. 206.

⁴⁸ *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Johnson v. Jones*, 4 Barb. (N. Y.) 369; *Higgins v. Armstrong*, 9 Colo. 38, 10 Pac. 232; *Bank of Morgantown v. Hay*, 143 N. C. 326, 55 S. E. 811; *Hutson v. Prudential Ins. Co.*, 122 Ga. 847, 50 S. E. 1000; *Hastings Nat. Bank v. Farmers' Bank*, 56 Neb. 149, 76 N. W. 430. Where authority of an agent is limited, the principal is not liable to third persons, having notice of such limitations, for acts done in violation thereof. *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278, 39 Am. Rep. 657.

⁴⁹ *Baxter v. Lamont*, 60 Ill. 237; *Siebold v. Davis*, 67 Iowa, 560, 25 N. W. 778; *Lovett, Hart & Phipps Co. v. Sullivan*, 189 Mass.

power.⁴⁹ Such a hard and fast rule, it is believed, can not be adopted, unless a very limited meaning be given to the term special agent.⁵⁰ A broker authorized to make a single sale is clearly a special agent, yet he is held out by the principal as having power to act in accordance with usage, and could, undoubtedly, bind the principal within the scope of his usual or apparent authority.⁵¹ "We think," says a learned author, "that the distinction between a general agency and a special agent useful, and sufficiently definite, for practical purposes; although it may have been pressed too far, and relied upon too much, in determining the responsibility of a principal for the acts of an agent. No agent has authority to be in all respects, and for all purposes, an *alter ego* of his principal, binding him by whatever the agent may do in reference to any subject whatever. On the other hand every agency must be so far general that it must cover not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it. Of late years, courts seem more disposed to regard this distinction, and the rules founded upon it, as altogether subordinate to that principle, which may be called the foundation of the law of agency, namely, that a principal is responsible, either when he has given to an agent

535, 75 N. E. 738; *Dowden v. Cryder*, 55 N. J. Law 329, 26 Atl. 941. A general agent is one authorized to do all acts connected with the particular trade, business or employment. *Columbus Show Case Co. v. Brinson*, 128 Ga. 487, 57 S. E. 871.

⁵⁰ *Fishbaugh v. Spunaugle*, 118 Iowa, 337, 92 N. W. 58; *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840; *Keith v. Herschberg Optical Co.*, 48 Ark. 138, 2 S. W. 777. The fact that authority of an agent is limited to a particular business does not make his agency special; it may be general in regard to that business. *Cruzan v. Smith*, 41 Ind. 288.

⁵¹ *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Newman v. Lee*, 87 App. Div. 116, 84 N. Y. Supp. 106.

sufficient authority, or, when he justifies a party dealing with his agent in believing that he has given to the agent this authority." ⁵²

In the case of a general agency there is, of course, wider ground for inference as to the possession of incidental or customary powers than in the case of a special agent employed for a single transaction; ⁵³ and, so, too, implication of authority to act in accordance with a particular usage might arise in the case of a professional agent, such as a broker or factor, where it would not arise if the agency were performed by a non-professional agent. ⁵⁴ Nevertheless, any agency carries with it implied power to do what is usual and necessary to the execution of the main authority; and where contrary limitations are imposed, but not disclosed to innocent third persons, this implied power becomes the measure of the scope of the agent's apparent authority. ⁵⁵

⁵² Parson on Contracts, Vol. I, p. 43; *Mechanics' Bank v. New York, etc., Ry.*, 13 N. Y. 632. While acting upon the matter of his agency, a special agent binds his principal as effectually as can a general agent. *Morton v. Scull*, 23 Ark. 289.

⁵³ *Blackwell v. Ketcham*, 53 Ind. 184; *Gilbert v. Deshon*, 107 N. Y. 324, 14 N. E. 318; *Cleveland, C. C. & St. L. Ry. v. Moore*, 170 Ind. 328, 82 N. E. 52. A special agent possesses no implied authority beyond what is indispensable to the exercise of the power expressly given, and must keep within the limits of his commission. *Bowles v. Rice*, 107 Va. 51, 57 S. E. 575.

⁵⁴ This distinction is illustrated by three English cases: A horse dealer authorized to sell has implied authority to warrant where a warranty on the part of horse dealers is usual. *Howard v. Sheward*, L. R. 2 C. P. 148. But a person not a horse dealer would not have such implied authority where authorized to sell privately. *Brady v. Todd*, 9 C. B. 592. Implication of such authority would arise where a person, not a horse dealer, was authorized to sell at a fair, if a warranty by a seller at a fair is the usual course of business. *Brooks v. Hassell*, 49 L. T. 569.

⁵⁵ *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840; *Oberne v. Burke*, 30 Neb. 581, 46 N. W. 838; *Bently v. Doggett*, 51 Wis. 224,

§ 93. **Notice of limitations.** The rules to be stated herein are corollary to the doctrine laid down in the foregoing subdivision. As was there indicated, third persons can not bind a principal by acts done within the apparent scope of his agent's authority, where such persons knew, or ought to have known, of contrary limitations.⁵⁶ Thus, where the authority of an agent is required by law to be in writing, third persons dealing with him are conclusively presumed to know that he acts under written instructions, and are bound absolutely by their nature and scope.⁵⁷ So, if a third person knows, or has reason to believe, that an agent's powers have been reduced to writing, he must, at peril, learn the tenor of the instrument under which the agent acts.⁵⁸ So generally, if a third person has knowledge, actual or constructive, of limitations upon the power of an agent, he will be bound thereby.⁵⁹ In dealing with a gen-

8 N. W. 155; *Mars v. Mars*, 27 S. C. 132, 3 S. E. 60; *Authors & Newspaper Ass'n v. O'Gorman Co.*, 147 Fed. 616. The question is not what authority was given, but what authority were third persons justified, from the acts of the principal, in believing had been given. *Aldrich v. Wilmarth*, 3 S. D. 525, 54 N. W. 811.

⁵⁶ *Ware v. Morgan*, 67 Ala. 461, *Trustees, etc., Ins. Corp. v. Bowling*, 2 Kan. App. 770, 44 Pac. 42; *Marvin v. Universal Ins. Co.*, 85 N. Y. 278; *Rogers v. Halden*, 142 Mass. 196, 7 N. E. 768.

⁵⁷ *Peabody v. Hoard*, 46 Ill. 242; *Wiese's Appeal*, 72 Pa. St. 351; *Nat. Iron Armor Co. v. Bruner*, 19 N. J. Eq. 331; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Frahm v. Metcalf*, 75 Neb. 241, 106 N. W. 227; *Davis v. Trachsler*, 3 Cal. App. 554, 86 Pac. 610. Purchasers of negotiable paper issued by an agent, the nature and extent of whose authority must by law appear upon the public records, are chargeable with notice of whatever appears upon those records. *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.

⁵⁸ *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31; *Rawson v. Curtis*, 19 Ill. 456; *Finch v. Causey*, 107 Va. 124, 57 S. E. 562; *Luckle v. Johnston*, 89 Ga. 321, 15 S. E. 459; *Chalson v. Beauchamp*, 12 Tex. Civ. App. 109, 34 S. W. 303.

⁵⁹ *Lucas v. Rader*, 29 Ind. App. 287, 64 N. E. 488; *Hodge v.*

eral agent, third persons, in the absence of circumstances sufficient to put a reasonable man on his guard, may assume that the agent possesses the power ordinarily conferred upon agents of like character; and no duty is upon them to make special inquiry as to limitations upon his authority.⁶⁰ But on the other hand, it is frequently stated as the rule that one who deals with a special agent deals at peril, and must acquaint himself with the exact scope of the agent's authority.⁶¹ Here again, the rule can be literally accepted only if a limited meaning be given to the term special agent; for it probably would not apply in the case of a recognized professional agent, such as a broker.⁶²

Combs, 66 U. S. 192; Jonathan Mills Mfg. Co. v. Whitehurst, 19 C. C. A. 130, 72 Fed. 496; Perry v. Smith, 29 N. J. Law, 74; Rail v. City Nat. Bank, 3 Tex. Civ. App. 557, 22 S. W. 865; Padley v. Neill, 134 Mo. 364, 35 S. W. 997; Gilbert v. Deshon, 107 N. Y. 324, 14 N. E. 318; Fritz v. Chicago Grain Co., 136 Iowa, 699, 114 N. W. 193. The question is usually one of fact for the jury. Glen v. Savage, 14 Ore. 567, 13 Pac. 442; Daylight Burner v. Odlin, 51 N. H. 56, 12 Am. Rep. 45.

⁶⁰ Saxonla Mining, etc., Co. v. Cook, 7 Colo. 569, 4 Pac. 1111; Banks v. Everest, 35 Kan. 687, 12 Pac. 141; Allis v. Voigt, 90 Mich. 125, 51 N. W. 190; Harrison v. Kansas City, etc., Ry., 56 Mo. App. 332; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427. Where a firm doing business in one place takes charge, under a chattel mortgage, of the business of an insolvent debtor in another place, and leaves him to carry it on in their name, it is not negligence for others to sell to the agent without inquiring as to the extent of his authority. Banner Tobacco Co. v. Jenison, 48 Mich. 459, 12 N. W. 655.

⁶¹ Wells v. Michigan Mut. Life Ins. Co., 41 W. Va. 131, 23 S. E. 527; Hayes v. Campbell, 63 Cal. 143; First Nat. Bank v. Hall, 8 Mont. 341, 20 Pac. 638; Galveston, etc., Ry. Co. v. Allen, 42 Tex. Civ. App. 576, 94 S. W. 417; Reid v. Alaska Packing Co., 47 Ore. 215, 83 Pac. 139.

⁶² Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358. An agent to sell has authority to warrant, if warranty be customary, and private restrictions upon the customary power can not, where

Usually, however, where an agent is employed to do a single act, the person with whom he deals must at peril ascertain the terms of the agent's authority.⁶³ Thus, where an agent was authorized to buy cotton of a designated person at a certain place, he was held not to have apparent authority to buy of a different person at a different place.⁶⁴ Here, clearly, the principal has done nothing to create the appearance of such authority. But if the agent had purchased the cotton of the proper person, it may be doubted whether such person would have been bound at peril to ascertain the existence of limitations upon powers which otherwise would have been implied as incidental to the authority given.⁶⁵

§ 94. **Summary.** In closing this discussion, it may be well to again remind the student that the law indulges no presumption as to the existence in one man of authority to represent another, except such as legitimately arises from the other's act or conduct; and that in order to bind a man, by virtue of dealings with his agent, authority of the agent, in all particulars, must be traced back to its source,—the assenting mind of the principal. The burden is upon him who seeks to bind the principal to establish the existence unknown to a purchaser, affect his rights. *Hayner v. Churchill*, 29 Mo. App. 676.

⁶³ *Johnson v. Alabama Gas, etc., Co.*, 90 Ala. 505, 8 South. 101; *Siebold v. Davis*, 67 Iowa, 560, 25 N. W. 778; *Bohart v. Oberne*, 36 Kan. 284, 13 Pac. 388. A person buying real estate of an agent must at his peril, ascertain the extent of the agent's authority. *Milne v. Kleb*, 44 N. J. Eq. 378, 14 Atl. 646.

⁶⁴ *Robinson Mercantile Co. v. Thompson*, 74 Miss. 847, 21 South. 794.

⁶⁵ A special agent who acts within his apparent authority binds his principal. *Howell v. Graff*, 25 Neb. 130, 41 N. W. 142. See *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190.

of the agency, and its nature and scope. The existence of an agency may be established by proof of express or implied appointment; and having been established, the law will infer authority in the agent to exercise medium powers and to act in accordance with known usage. This inference can not arise in face of express restrictions to the contrary; but it will be indulged in favor of those who did not know of such restrictions, or, who, in view of the character of the agency, were not bound to ascertain their existence.

CHAPTER IX.

SCOPE OF PARTICULAR AGENCIES.

- § 95. In general.
- 96. Agent to sell.
 - (a) Personalty.
 - (b) Realty.
- 97. Agent to purchase.
- 98. Agent to receive payment.
- 99. Agent to execute commercial paper.
- 100. Agent to manage business.
- 101. Bank cashier.
- 102. Factor.
- 103. Broker.
- 104. Auctioneer.
- 105. Attorney-at-law.

§ 95. In general. As we have seen in the preceding chapter, unless the principal has indicated a contrary intention, an agent is held to have implied authority to do what is reasonably necessary to the accomplishment of the purpose of his agency, and to act in accordance with the usages and customs of the business for which he was engaged.¹ Furthermore, though the existence of such implied power is precluded by reason of contrary limitations, yet, as against third persons, who had neither actual or constructive notice of them, the agent is held to have apparent authority coextensive in scope with the real authority which he would have had, in the absence of such undisclosed limitations; and within the scope of this apparent authority he may bind the principal.² So, we saw at

¹ Ante § 89.

² Ante § 91.

the very outset of this treatment of our subject, that there were a number of well established forms of agency to which the law gave recognition; and that where the duties of a particular agent are well defined by custom, the law assumes, in the absence of express restrictions, that the authority of such an agent, in any particular case, extends to the performance of those functions for which he ordinarily is employed.³ This chapter shall be devoted to examples of practical application of the doctrines in question.

§ 96. Agent to sell. (a) **Personalty.** Authority to sell personal property may be expressly given or may be implied from acts or conduct.⁴ Implication of such authority does not arise from mere possession of property;⁵ but intrusting another with possession, under circumstances sufficient to create a clear appearance of a right to sell, may estop the real owner to assert his title,⁶ as where he sends his goods to an auction room;⁷ or invests the person, intrusted with possession, with documentary evidence of title.⁸ An agent authorized to sell, has implied power to fix a reasonable price, and to agree upon usual terms of sale;⁹ but

³ Ante § 11.

⁴ Ante § 50.

⁵ *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 56 N. W. 663.

⁶ *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *Smith v. Clews*, 105 N. Y. 283, 11 N. E. 632.

⁷ *Pickering v. Bush*, 15 East, 38; *Nixon v. Brown*, 57 N. H. 34; *Heath v. Stoddard*, 91 Me. 499, 40 Atl. 547.

⁸ *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Walker v. Railway Co.*, 47 Mich. 338, 11 N. W. 187.

⁹ *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Tollerton & Warfield Co. v. Gilruth*, 21 S. D. 320, 112 N. W. 842. Authority to sell does not imply power to compromise differences as to the goods

not to sell on credit, unless in pursuance of a well established usage;¹⁰ nor to exchange or barter;¹¹ nor to pledge or mortgage.¹² An agent to sell, who is intrusted with possession of the goods, has implied power to receive payment;¹³ but an agent authorized merely to solicit orders has no such power.¹⁴ So, if the sale is one usually accompanied by a warranty, the agent will have implied power to make such customary warranty.¹⁵ In any of the cases cited, contrary limitations upon the implied power of an agent will not affect third persons who had no actual or constructive notice of them.¹⁶

(b) **Realty.** Since the sale of real estate can be effected only by the execution of a deed, power to sell realty

being of the represented standard. *Scarritt-Comstock Furniture Co. v. Hudpeth*, 19 Okl. 429, 91 Pac. 843.

¹⁰ *Payne v. Potter*, 9 Iowa, 549; *Graul v. Strutzel*, 53 Iowa, 715, 6 N. W. 119; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Burks v. Hubbard*, 69 Ala. 379.

¹¹ *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Taylor v. Starkley*, 59 N. H. 142.

¹² *Voss v. Robertson*, 46 Ala. 483; *Switzer v. Wilvers*, 24 Kan. 384, 36 Am. Rep. 259.

¹³ *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Higgins v. Moore*, 34 N. Y. 417; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22.

¹⁴ *Janney v. Boyd*, 30 Minn. 319, 15 N. W. 308; *Clark v. Smith*, 88 Ill. 298; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Brown v. Lalley*, 79 Minn. 38, 81 N. W. 538. Agency to sell does not necessarily carry with it power to collect. *Toole v. Crews*, 3 Ga. App. 238, 59 S. E. 727.

¹⁵ *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550; *Talmadge v. Bierhaue*, 103 Ind. 270, 2 N. E. 716; *McAlpine v. Cassidy*, 17 Tex. 449; *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169; *Second Nat. Bank v. Adams*, 29 Ky. Law Rep. 566, 93 S. W. 671. The question as to what is usual in such a case is ordinarily one for the jury. *Herring v. Skagg*, 62 Ala. 180, 34 Am. Rep. 4.

¹⁶ *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Luckie v.*

must be given under seal;¹⁷ though, as we have seen, a deed executed by an agent under parol authority may take effect as a contract to convey.¹⁸ An agent authorized merely to enter into a contract of sale has no implied power to receive the purchase price;¹⁹ and, though authorized to execute a conveyance, would have implied power to receive only so much of the purchase price as was payable at the time of conveyance.²⁰ Power to sell land does not imply authority to sell on credit;²¹ or to mortgage;²² although it would seem to carry with it implied power to insert in the conveyance usual covenants of general warranty.²³ Any implication of authority must arise from a proper construction of the written power under which the agent acts, and as his instructions are known to be in writing, there would be practically no occasion for operation of the doctrine of apparent authority.

§ 97. **Agent to purchase.** Authority to buy does not imply power to buy on credit,²⁴ unless the agent has not

Johnston, 89 Ga. 321, 15 S. E. 459; *Trainer v. Morison*, 78 Me. 160, 3 Atl. 185.

¹⁷ Ante § 46.

¹⁸ Id.

¹⁹ *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771; *Alexander v. Jones*, 64 Iowa, 207, 19 N. W. 913.

²⁰ *Johnson v. McGruder*, 15 Mo. 365; *Carson v. Smith*, 5 Minn. 78; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540; *Johnson v. Craig*, 21 Ark. 533.

²¹ *Lumpkin v. Wilson*, 5 Helsk. (Tenn.) 555; *Winders v. Hill*, 141 N. C. 694, 54 S. E. 440. An agent to sell land can not bind his principal by acceptance of a check in part payment. *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724.

²² *Jeffrey v. Hursh*, 49 Mich. 31; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Ferry v. Laible*, 31 N. J. Eq. 566.

²³ *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671; *LeRoy v. Beard*, 8 How. (U. S.) 451; *Backman v. Charlestown*, 42 N. H. 125.

²⁴ *Berry v. Barnes*, 23 Ark. 411.

been supplied with funds,²⁵ or it is an established custom of the trade to buy on credit.²⁶ Neither may he, as a rule, execute negotiable paper in payment.²⁷ An agent to buy has implied power to fix the price and terms of sale, provided they are reasonable and usual.²⁸ But he may not buy goods of a different kind or amount than authorized;²⁹ pay a higher price,³⁰ or buy from persons other than those with whom he is directed to deal.³¹ Where, however, the agency was of such a character as to create an appearance of authority to exercise discretion in these particulars, the principal will be bound by acts within the apparent scope of the agent's authority.³²

§ 98. **Agent to receive payment.** Authority to collect does not imply power to receive payment in anything but

²⁵ *Sprague v. Gillett*, 9 Metc. (Mass.) 91. An agent, authorized to buy goods, where no funds are advanced him, has implied power to buy on credit. *Swindell v. Latham*, 145 N. C. 144, 58 S. E. 1010.

²⁶ *Jaques v. Todd*, 3 Wend. (N. Y.) 83; *Temple v. Pomroy*, 4 Gray (Mass.), 128; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190; *Komorowski v. Krumdick*, 56 Wis. 23, 13 N. W. 881.

²⁷ *Taber v. Cannon*, 8 Metc. (Mass.) 456; *Webber v. Williams College*, 23 Pick. (Mass.) 302; *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438; Post § 99.

²⁸ *Owen v. Brockschmidt*, 54 Mo. 285; *Wishard v. McNeill*, 85 Iowa, 474, 52 N. W. 474; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96.

²⁹ *Davies v. Lyon*, 36 Minn. 427, 31 N. W. 688; *Olyphant v. McNair*, 41 Barb. (N. Y.) 446.

³⁰ *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96.

³¹ *Peckham v. Lyon*, 4 McLean (U. S.) 45; *Robinson Mercantile Co. v. Thompson*, 74 Miss. 847, 21 South. 794; *Eckart v. Roehm*, 43 Minn. 27, 45 N. W. 443.

³² *Butler v. Maples*, 9 Wall. (U. S.) 766; *Hill v. Miller*, 76 N. Y. 32; *Hubbard v. Tenbrook*, 124 Pa. St. 291, 16 Atl. 817; *Liddell v. Sahline*, 55 Ark. 627, 17 S. W. 705.

money;³³ and if authority to receive paper be given, power is not implied to indorse the same.³⁴ An agent may receive part payment;³⁵ but has no implied authority to compromise a debt, or extend the time of its payment.³⁶ Authority to receive payment will be implied where it is a necessary incident to the business for which an agent is engaged;³⁷ but authority to collect a note is not implied from the fact of its possession;³⁸ nor will an inference of power to collect money, due under a contract, arise from the fact that the agent negotiated the same.³⁹ Where, however, an agent who negotiated the making of a loan was permitted to keep possession of the note and mortgage, after the same was due, and this was known to the debtor, the creditor was held to be estopped to deny the agent's authority to receive

³³ *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12; *Padfield v. Green*, 85 Ill. 529; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726; *Wees v. Page*, 47 Wash. 213, 91 Pac. 766. An agent to sell land can not bind his principal by acceptance of a check in part payment. *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724.

³⁴ *Jackson v. Bank*, 92 Tenn. 154, 20 S. W. 820; *National Fence Mach. Co. v. Highleyman*, 71 Kan. 347, 80 Pac. 568; *Hamilton Nat. Bank v. Nye*, 37 Ind. App. 464, 77 N. E. 295.

³⁵ *Whelan v. Reilly*, 61 Mo. 565.

³⁶ *Herring v. Hottendorf*, 74 N. C. 588; *McHany v. Schenck*, 83 Ill. 357; *John Gund Brewing Co. v. Peterson*, 130 Iowa, 301, 106 N. W. 741; *Ritch v. Smith*, 82 N. Y. 627.

³⁷ *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762; *Ladd v. Aetna Indemnity Co.*, 128 Fed. 298. Authority to sell goods and collect the price does not imply power to open a bank account for the principal nor to borrow money. *Case v. Hammond Packing Co.*, 105 Mo. App. 168, 79 S. W. 732.

³⁸ *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502. Authority to collect interest on a note implies no power to collect the principal. *Higley v. Dennis*, 40 Tex. Civ. App. 133, 88 S. W. 400.

³⁹ *Thompson v. Elliott*, 73 Ill. 221; *Ortmeler v. Ivory*, 203 Ill. 577, 70 N. E. 665.

payment.⁴⁰ A general authority to collect will imply power to bring suit and engage counsel,⁴¹ or to employ a subagent at the place of payment.⁴²

§ 99. **Agent to execute commercial paper.** Authority to execute or indorse commercial paper is seldom implied; ⁴³ and when expressly given, is strictly construed.⁴⁴ As was said in an early Massachusetts case: "The power of binding by promissory negotiable notes can be conferred only by direct authority of the party to be bound, with the single exception where, by necessary implication, the duties to be performed can not be discharged without the exercise of such power."⁴⁵ Thus, an agent authorized to "accomplish a complete adjustment" of his principal's affairs in a particular state was held not to have power to execute a promissory note; ⁴⁶ nor will authority to sign the principal's name in the general transaction of business include power to sign a promissory note.⁴⁷ So, authority to pay for goods, does not include power to give the principal's note in payment, or to accept a bill of exchange drawn for

⁴⁰ *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456; *Bautz v. Adams*, 131 Wis. 152, 111 N. W. 69.

⁴¹ *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216; *Scott v. El-mendorf*, 12 Johns. (N. Y.) 317; *Merrick v. Wagner*, 44 Ill. 266; *Moore v. Hall*, 48 Mich. 145, 11 N. W. 844; *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 797.

⁴² *Dorchester & Milton Bank v. Bank*, 1 Cush. (Mass.) 177; Ante § 36.

⁴³ *Webber v. Williams College*, 23 Pick. (Mass.) 302; *Exchange Bank v. Thower*, 118 Ga. 433, 45 S. E. 316.

⁴⁴ *Tate v. Evans*, 7 Mo. 419; *Batty v. Carswell*, 2 Johns. (N. Y.) 48; *King v. Sparks*, 77 Ga. 285, 1 S. E. 266.

⁴⁵ *Paige v. Stone*, 10 Metc. (Mass.) 160, 43 Am. Dec. 420.

⁴⁶ *Rossiter v. Rossiter*, 3 Wend. (N. Y.) 494, 24 Am. Dec. 62.

⁴⁷ *Brantley v. Southern Life Ins. Co.*, 53 Ala. 554.

the amount.⁴⁸ Where expressly given, the agent must keep strictly within the limit of his power;⁴⁹ and parties dealing with him must ascertain his authority.⁵⁰ Thus power to execute a note for a given purpose does not include power to execute for a different purpose,⁵¹ or for other than the authorized amount.⁵² So, authority to make a note does not include power to give a renewal;⁵³ nor to make the note payable at a different date than that authorized.⁵⁴ Power to execute or indorse commercial paper will be implied only when a necessary incident to the business for which the agent was engaged.⁵⁵

§ 100. **Agent to manage business.** The doctrine of implied and apparent authority, naturally, finds wide application in the case of an agent employed to manage generally

⁴⁸ *Taber v. Cannon*, 8 Metc. (Mass.) 456; *Morris v. Bowen*, 52 N. H. 416.

⁴⁹ *Nixon v. Palmer*, 8 N. Y. 398; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728.

⁵⁰ *Blackwell v. Ketcham*, 53 Ind. 184; ⁴*Craighead v. Peterson*, 72 N. Y. 279. But a principal who delivers to an agent negotiable paper signed in blank will be liable to innocent third persons notwithstanding that the agent violated instructions in filling out the paper. *Davis v. Lee*, 26 Miss. 505; *Snyder v. Van Doran*, 46 Wis. 610; *Bank v. Neal*, 22 How. (U. S.) 107.

⁵¹ *Nixon v. Palmer*, 8 N. Y. 398; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728.

⁵² *Blackwell v. Ketcham*, 53 Ind. 184; *King v. Sparks*, 77 Ga. 285, 1 S. E. 266.

⁵³ *Ward v. Bank*, 7 T. B. Mon. (Ky.) 93.

⁵⁴ *Batty v. Carswell*, 2 Johns. (N. Y.) 48; *Tate v. Evans*, 7 Mo. 419; *New York Iron Mine Co. v. Bank*, 44 Mich. 344, 6 N. W. 823.

⁵⁵ *Merchants' Bank v. Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Manhattan Liquor Co. v. Mangus*, 43 Tex. Civ. App. 463, 94 S. W. 1117. Power to execute negotiable instruments is implied as an incident to an agency only when the purpose of the same can not otherwise be accomplished. *Temple v. Pomroy*, 4 Gray (Mass.), 128; *Jackson v. Bank*, 92 Tenn. 154, 20 S. W. 802.

some business of his principal. In the absence of express restrictions, such an agent has implied power to do whatever is reasonably necessary to carry on the business in the usual and customary manner;⁵⁶ and contrary limitations, unless disclosed, will not be binding on third persons who deal with the agent in reliance upon his apparent authority.⁵⁷ Thus, the manager of a store, hotel, farm or mine has implied authority to buy on credit whatever goods are needed in the conduct of the business;⁵⁸ or to make whatever contracts are necessary thereto.⁵⁹ He has implied power to sell whatever is necessary or usual to sell in the conduct of the business;⁶⁰ but not to sell the business,⁶¹ mortgage property,⁶² or engaged in a different business.⁶³

⁵⁶ *German Fire Ins. Co. v. Grunert*, 112 Ill. 68, 1 N. E. 113; *Roche v. Pennington*, 90 Wis. 107, 62 N. W. 946; *King v. Seaboard, etc., Ry. Co.*, 140 N. C. 433, 53 S. E. 237. Where it is necessary to the operation of a mine that provisions be furnished to the keeper of a boarding house, where miners live, the superintendent may bind the operator for such supplies. *Heald v. Hendy*, 89 Cal. 632, 27 Pac. 67.

⁵⁷ *Harrison v. Missouri Pac. Ry.*, 74 Mo. 364, 41 Am. Rep. 318.

⁵⁸ *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Cummings v. Sargent*, 9 Metc. (Mass.) 172; *Taylor v. Labeaume*, 17 Mo. 338. The burden is on plaintiff to show that the goods were such as the nature of the business justified purchasing. *Wallis Tobacco Co. v. Jackson*, 99 Ala. 460, 13 South. 120.

⁵⁹ *Heald v. Hendy*, 89 Cal. 632, 27 Pac. 67; *King v. Seaboard, etc., Ry.*, 140 N. C. 433, 53 S. E. 237. The manager of a hotel has implied authority to bind his principal by contract for advertising the hotel. *Calhoon v. Buhre*, 75 N. J. Law, 439, 67 Atl. 1068.

⁶⁰ *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775; *Johnson v. Investment Co.*, 46 Neb. 480, 64 N. W. 1100.

⁶¹ *Holbrook v. Oberne*, 56 Iowa, 324, 9 N. W. 291; *Vescellus v. Martin*, 11 Colo. 391, 18 Pac. 338.

⁶² *Despatch Line v. Manufacturing Co.*, 12 N. H. 205, 37 Am. Dec. 203.

⁶³ *Campbell v. Hastings*, 29 Ark. 512; *Hazeltine v. Miller*, 44 Me. 177.

"If," as was said in a New York case, "the transaction of business absolutely required the exercise of power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment." ⁶⁴

§ 101. **Bank cashier.** The scope of a bank cashier's implied authority, and hence of his apparent authority, is large. "Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the powers necessary for such an officer in the transaction of the legitimate business of banking." ⁶⁵ Within the scope of authority usually conferred upon cashiers, he may bind the bank, notwithstanding unusual restrictions, in dealings with third persons who relied upon his apparent authority.⁶⁶ Thus, if a cashier, contrary to instructions, certifies a check, the bank is liable thereon to the person to whom it was issued, provided such person was without notice that the cashier was forbidden to certify.⁶⁷ By virtue of his position, a cashier has implied power to collect debts due the bank; ⁶⁸ to draw checks upon funds of the bank deposited elsewhere; ⁶⁹ to buy and sell bills of exchange; ⁷⁰ to indorse negotiable pa-

⁶⁴ *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438. But the inference will not arise unless the power to borrow is practically indispensable to execution of the agency.

⁶⁵ *West St. Louis Sav. Bank v. Bank*, 95 U. S. 557.

⁶⁶ *Case v. Citizens' Bank*, 100 U. S. 446.

⁶⁷ *Merchants' Nat. Bank v. Bank*, 10 Wall. (U. S.) 604; *Cooke v. Bank*, 52 N. Y. 96, 11 Am. Rep. 667.

⁶⁸ *Badger v. Bank*, 26 Me. 428.

⁶⁹ *Merchants' Nat. Bank v. Bank*, 10 Wall. (U. S.) 604.

⁷⁰ *Fleckner v. Bank*, 8 Wheat (U. S.), 338.

per; ⁷¹ and generally, to perform such functions as are usual and customary in the conduct of banking business.⁷²

§ 102. **Factor.** A factor, as we have seen, is an agent to sell goods of which, ordinarily, he has possession. When he guarantees payment, he is called a *del credere* agent.⁷³ In the absence of contrary restrictions, a factor has implied authority to sell in his own name,⁷⁴ to fix prices,⁷⁵ give credit,⁷⁶ and to receive payment;⁷⁷ so in pursuance of established usage, he may make warranties.⁷⁸ A factor has neither implied nor apparent authority to pledge the principal's goods for his own debt;⁷⁹ though he may pledge them for payment of charges against the goods themselves, as for duties levied upon them.⁸⁰ Neither has a factor im-

⁷¹ City Bank v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332.

⁷² West St. Louis Sav. Bank v. Bank, 95 U. S. 557; Case v. Bank, 100 U. S. 446; Clarke Nat. Bank v. Bank, 52 Barb. (N. Y.) 592.

⁷³ Ante § 8.

⁷⁴ Graham v. Duckwall, 8 Bush. (Ky.) 12.

⁷⁵ Smart v. Sanders, 3 C. B. (Eng.) 380; Putnam v. French, 53 Vt. 402.

⁷⁶ Van Alen v. Vanderpool, 6 Johns. (N. Y.) 69; Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; Burton v. Goodspeed, 69 Ill. 238; Pinkham v. Crocker, 77 Me. 563.

⁷⁷ Rice v. Groffmann, 56 Mo. 434.

⁷⁸ Randall v. Kehler, 60 Me. 37; Argersinger v. Macnaughton, 114 N. Y. 535, 21 N. E. 1022; (Limiting rule).

⁷⁹ Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196; Thurston v. Blanchard, 22 Pick (Mass.) 20, 33 Am. Dec. 700; Allen v. St. Louis Bank, 120 U. S. 20, 7 Sup. Ct. 460; Benny v. Pegram, 18 Mo. 191, 59 Am. Dec. 298. Factors' acts in a number of states protect the rights of innocent parties who have dealt with a factor in the belief that he was owner of the goods. Stimson, Am. Stat. Law, § 4381.

⁸⁰ Evans v. Potter, 2 Gall. (U. S.), 2. Or to meet a draft drawn by the principal against proceeds before sale. Boyce v. Commerce Bank, 22 Fed. 53.

plied power to barter goods;⁸¹ nor to delegate his authority,⁸² unless the employment of subagents is justified by usage of the trade, or the course of dealings between the factor and his principal.⁸³ A factor has no implied authority to bind the principal by negotiable paper.⁸⁴

§ 103. **Broker.** A broker has implied power to perform such acts as are necessarily incident to the accomplishment of his agency and to follow established usages of his business.⁸⁵ He may usually fix a reasonable price,⁸⁶ agree to terms of sale,⁸⁷ and give such warranties as are justified by custom.⁸⁸ His authority, as a rule, does not include power to receive payment for goods sold;⁸⁹ or to delegate to another the duties intrusted to him.⁹⁰ Within the scope of authority ordinarily possessed by brokers, he may bind his

⁸¹ *Wing v. Neal* (Me.), 2 Atl. 881; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89.

⁸² *Warner v. Martin*, 11 How. (U.S.) 209; *Loomis v. Simpson*, 13 Iowa, 532; Ante § 33.

⁸³ *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 368, 9 Am. Dec. 440.

⁸⁴ *Emerson v. Providence Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; Ante § 99.

⁸⁵ Ante § 89.

⁸⁶ *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

⁸⁷ *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Shackman v. Little*, 87 Ind. 181; Ante § 89.

⁸⁸ *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550; *Smith v. Tracy*, 36 N. Y. 82; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359. But see *Dood v. Farlow*, 11 Allen (Mass.), 426, 87 Am. Dec. 726.

⁸⁹ *Saladin v. Mitchell*, 45 Ill. 79; *Graham v. Duckwall*, 8 Bush. (Ky.) 12; *Higgins v. Moore*, 34 N. Y. 417.

⁹⁰ Unless power can be implied from usage as in the case of other agents. *Gheen v. Johnson*, 90 Pa. St. 38; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125.

principal in favor of innocent third persons, notwithstanding undisclosed restrictions upon his authority.⁹¹

§ 104. **Auctioneer.** The implied powers of an auctioneer are very limited.⁹² He can not sell at private sale or on credit;⁹³ nor can he accept anything but money in payment for goods sold;⁹⁴ deliver the same without payment;⁹⁵ give a warranty;⁹⁶ or delegate his authority.⁹⁷ So, it has been held that a sale for less than the price fixed by the principal would not be binding, even in favor of one who relied upon the apparent authority of the auctioneer to determine the sale price.⁹⁸

§ 105. **Attorney-at-law.** An attorney-at-law is said to have implied power "to do all acts, in or out of court, necessary or incidental to the prosecution or management of the suit, and which affect the remedy only, and not the cause of action."⁹⁹ He may make such affidavits as are necessary in the progress of the cause;¹⁰⁰ serve, or accept service, of all necessary processes;¹⁰¹ stipulate as to the issues to be tried;¹⁰² make admissions of fact for purpose

⁹¹ *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Ante § 91.

⁹² *Williams v. Poor*, 3 Cranch. (U. S.) 251; *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343.

⁹³ *Marsh v. Jelf*, 3 F. & F. (Eng.) 234; *Williams v. Evans*, L. R. 1 Q. B. (Eng.) 352.

⁹⁴ *Broughton v. Silloway*, 114 Mass. 71, 19 Am. Rep. 312.

⁹⁵ *Broughton v. Silloway*, supra; *Brown v. Staton*, 2 Chit. (Eng.) 353.

⁹⁶ *Blood v. French*, 9 Gray (Mass.), 197.

⁹⁷ *Com. v. Harnden*, 19 Pick. (Mass.) 482.

⁹⁸ *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343.

⁹⁹ *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72.

¹⁰⁰ *Wright v. Parks*, 10 Iowa, 342; *Manley v. Headley*, 10 Kan. 88.

¹⁰¹ *Anderson v. Watson*, 3 C. & P. (Eng.) 214; *Hefferman v. Burt*, 7 Iowa, 320, 71 Am. Dec. 445.

¹⁰² *Bingham v. Supervisors*, 6 Minn. 136.

of trial;¹⁰⁸ submit a cause to arbitration;¹⁰⁴ order printing of necessary briefs;¹⁰⁸ release an attachment or lien;¹⁰⁸ dismiss an action, or agree to a nonsuit;¹⁰⁷ and bring a new action, after a nonsuit.¹⁰⁸ But on the other hand, such attorney has no implied authority to confess judgment;¹⁰⁹ release the cause of action;¹¹⁰ compromise the claim;¹¹¹ release property from the lien of a judgment or execution;¹¹² or in any way prejudice the substantial rights of his client.¹¹³

¹⁰⁸ *Starke v. Kenan*, 11 Ala. 819; *Lewis v. Sumner*, 13 Metc. (Mass.) 269. Admissions must be distinct and formal and made for purpose of dispensing with proof. *Treadway v. Sioux City. etc. Ry.*, 40 Iowa, 526.

¹⁰⁴ *Sargeant v. Clark*, 108 Pa. 588; *Holker v. Parker*, 7 Cranch. (U. S.) 436; *Brooks v. New Durham*, 55 N. H. 559; *Haskell v. Whitney*, 12 Mass. 47; *Connett v. Chicago*, 114 Ill. 233.

¹⁰⁸ *Weisse v. New Orleans*, 10 La. Ann. 46; *Williamson, etc., Paper Co. v. Bosbyshell*, 14 Mo. App. 534.

¹⁰⁸ Provided the release be made before judgment. *Benson v. Carr*, 73 Me. 76.

¹⁰⁷ *Barrett v. Railway Co.*, 45 N. Y. 628; *McLeran v. McNamara*, 55 Cal. 508; *Rogers v. Greenwood*, 14 Minn. 333.

¹⁰⁸ *Scott v. Elemendorf*, 12 Johns. (N. Y.) 317.

¹⁰⁹ *Wadhams v. Gray*, 73 Ill. 415; *Pfister v. Wade*, 69 Cal. 133. 10 Pac. 369.

¹¹⁰ *Mandeville v. Reynolds*, 68 N. Y. 528; *Gilliland v. Gasque*. 6 S. C. 406; *Wadhams v. Gray*, 73 Ill. 415.

¹¹¹ *Fritchey v. Bosley*, 56 Md. 96; *Jones v. Inniss*, 32 Kan. 177. 4 Pac. 95; *Maddux v. Bevans*, 39 Md. 485; *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007; *Danzlger v. Pittsfield Shoe Co.*, 204 Ill. 145, 68 N. E. 534.

¹¹² *Phillips v. Dobbins*, 56 Ga. 617; *Horsey v. Chew*, 65 Md. 555; *Benedict v. Smith*, 10 Paige (N. Y.), 126.

¹¹³ *Halliday v. Stuart*, 151 U. S. 229, 14 Sup. Ct. 302; *Lambert v. Sanford*, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149; *Marbourg v. Smith*, 11 Kan. 554. Whatever the attorney does in the prosecution of the remedy will usually be binding on the client though it results to his disadvantage. *Beck v. Bellamy*, 93 N. C. 129; *Foster v. Wiley*, 27 Mich. 244; *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72.

PART III.

RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND THIRD PERSONS.

CHAPTER X.

FORM OF EXECUTION NECESSARY TO BIND PRINCIPAL.

- § 106. In general.**
- 107. Sealed instruments.**
- 108. Negotiable instruments.**
 - (a) In general.**
 - (b) Parol evidence rule.**
 - (c) Cashier.**
- 109. Other contracts.**
 - (a) Undisclosed agency.**
 - (b) Election to hold principal.**
 - (c) Settlement with agent.**
- 110. Agent's liability.**

§ 106. In general. Where an agent, acting within the scope of his authority, real or apparent, enters into a contract on behalf of his principal, the latter is bound thereby as effectually as though he had contracted in person. This statement of law involves the conception of the double condition that the contract was within the scope of the agent's authority, and that it was entered into by the agent on behalf of the principal. Clearly, an agent authorized to purchase a horse does not bind his principal by a bargain not

made in the principal's behalf. Thus far in our discussion we have been concerned chiefly with the question of authority,—the manner of its bestowal, and the mode of establishing proof of its existence. In the present chapter we are to deal more particularly with the manner of executing authority, and the mode of establishing the condition that its execution was for, and in behalf of, the principal.

§ 107. **Sealed instruments.** A sealed instrument, though executed by an agent within the scope of his authority, will not be binding upon the principal unless it appears upon the face of the instrument that the same was executed in behalf of the principal, and that he, clearly, is the party thereto.¹ In determining this condition, extraneous evidence will not be considered, but the instrument alone is relied upon;² and in construing the instrument, for the purpose of its determination, strict and technical rules are observed.³ Broadly stated, a principal can not be made liable upon a sealed instrument executed for him by his agent unless he appears as the party thereto, and the grant or covenant purports to be his, and the instrument is signed and sealed by or for him.⁴

It is not sufficient to bind the principal that his agent, in executing an instrument, describes himself as such. No

¹ *Stinchfield v. Little*, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; *Fullman v. Westbrookfield*, 9 Allen (Mass.), 1; *Vance v. Anderson*, 39 Iowa, 426; *Cadell v. Allen*, 99 N. C. 542, 6 S. E. 399; *Van Dyke v. Van Dyke*, 123 Ga. 686, 51 S. E. 582.

² *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71.

³ *McClure v. Herring*, 70 Mo. 18, 35 Am. Rep. 404; *Hunington v. Knox*, 7 Cush. (Mass.) 371.

⁴ *Prather v. Ross*, 17 Ind. 495; *Couch v. Ingersoll*, 2 Pick. (Mass.) 292; *Cadell v. Allen*, 99 N. C. 542, 6 S. E. 399.

legal effect is given to mere *descriptio personae*. Thus, where a bond was executed by persons who described themselves as "Trustees of the Baptist Society of the Town of Richfield," the court held that it was not the bond of the Baptist Church.⁵ So, it is not sufficient to bind the principal that the instrument recites that the agent acts as his attorney, or by virtue of power by him bestowed; for a contract, under strict rules of construction, applicable to sealed instruments, is not necessarily the personal obligation of a party merely because of some indication that it was made at his behest or for his benefit. Thus, in an early Massachusetts case, one Jonathan Elwell duly authorized Joshua Elwell to execute a conveyance of land; and the latter set forth in a deed his power of attorney from Jonathan, and followed its recital, in substance, with the words: "Now know ye, that I, the said Joshua, by virtue of the power aforesaid, do hereby grant and convey, etc. And I do covenant that the said Jonathan at the time of executing said power was, and now is, lawfully seized of the premises and that he will warrant and defend the same, etc. In testimony whereof, I have hereunto set the name and seal of the said Jonathan." The instrument was signed "Joshua Elwell" (L. S.). This was not the deed of the principal, Jonathan Elwell; for clearly, neither in the body, nor in the execution, of the instrument does the principal appear as grantor.⁶ So, in another case, a deed, purporting to be made by "The New

⁵ Taft v. Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; Lutz v. Linthicum, 8 Pet. (U. S.) 165; Quigley v. De Haas, 82 Pa. St. 267; Dayton v. Warne, 43 N. J. Law, 659; Pratt v. Beaupre, 13 Minn. 187.

⁶ Elwell v. Shaw, 16 Mass. 42, 8 Am. Dec. 126; Stinchfield v. Little, 1 Greenl. (Me.) 231, 10 Am. Dec. 65.

England Silk Company, a corporation, by Christopher Colt, their treasurer," was attested: "In witness whereof, I, the said Christopher Colt, in behalf of said company, and as their treasurer, have hereunto set my hand and seal;" and was signed "Christopher Colt, Treasurer, New England Silk Company;" and acknowledged as the free act and deed of Christopher Colt, Treasurer, etc. The instrument was held not to be the deed of the corporation, for the reason that it was not executed in the name of the company.⁷ As was said in another case: "However clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney or of no one."⁸

Where a deed is properly executed in the name of the principal, the courts incline to greater indulgence with inaccuracies in the body of the instrument.⁹ Thus, where a party to a lease was described as "Edward F. Lawrence, President of the Northwestern Distilling Company," but the instrument was signed "Northwestern Distilling Company. (L. S.) By Edward F. Lawrence, President;" it was held to be the lease of the company.¹⁰ So, in a Missouri case, the deed in substance read: "I, Thomas W. Hawkins, for myself and as attorney for Leo Tarlton and Augusta Tarl-

⁷ *Brinley v. Mann*, 2 Cush. (Mass.) 337, 48 Am. Dec. 669. He should have executed the deed in the name of the company, should also have affixed the seal of the company, and acknowledged the instrument to be the deed of the company.

⁸ *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *Mussey v. Scott*, 7 Cush. (Mass.) 216, 54 Am. Dec. 719; *Fowler v. Shearer*, 7 Mass. 14.

⁹ *Shanks v. Lancaster*, 5 Gratt. (Va.) 110, 50 Am. Dec. 108; *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176; *Butterfield v. Beall*, 3 Ind. 203.

¹⁰ *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 10 Am. Rep. 431.

ton, by their letters of attorney, in consideration, etc., to us paid, do sell and convey, etc. And we, the said Leo Tarlton and Augusta Tarlton, do covenant, etc. In witness whereof, I, Thomas W. Hawkins, in my own right have hereunto set my hand and seal, and as attorney for Leo Tarlton and Augusta Tarlton, have hereunto set their hands and seals." The deed was signed: "Thomas W. Hawkins (L. S.), Leo Tarlton (L. S.), Augusta Tarlton (L. S.), By Thomas W. Hawkins, their attorney in fact." This instrument was held good against the principals.¹¹ "The manner in which the deed was executed," said the court, "the covenants entered into by Tarlton and his wife that they would warrant the title; the declaration in the deed that Hawkins is acting for the principals, naming them, by virtue of their power of attorney, the acknowledgment of the receipt of the money by 'us,' unmistakably show that it was the deed of the principals; and as this all appears clearly in the instrument, the precise form or arrangement of the words does not seem to be essential."¹²

The usual and approved form of executing a deed by attorney is to write the principal's name and add "By A. B., his attorney." But, as has frequently been held, this is not the only form.¹³ Thus, where a lease, purporting to be made by one Mussey, was signed "John Hammond for B. B.

¹¹ McClure v. Herring, 70 Mo. 18, 35 Am. Rep. 404.

¹² McClure v. Herring, *supra*.

¹³ Wilburn v. Larkin, 3 Blackf. (Ind.) 55; Hutchins v. Byrnes, 9 Gray (Mass.), 367; Whitehead v. Reddick, 34 N. C. 95; Hale v. Woods, 10 N. H. 470, 34 Am. Dec. 176. The form of signature employed by an agent is unimportant, so that it appears that the contract is in the name of the principal. Lazarus v. Shearer, 2 Ala. 718. It is not necessary that it appears upon the face of the instrument that it is executed by an attorney. First Nat. Bank v. Loyhed, 28 Minn. 396, 10 N. W. 421.

Mussey," the execution was deemed sufficient to bind the principal.¹⁴ Though, the ruling might have been different had the instrument been signed: "John Hammond, Agent of," or even "Agent for, Mussey;" since such designation might have been mere *descriptio personae*.¹⁵ Application of the rules under discussion naturally leads to some discord in the decisions. An instrument that one court might construe as sufficiently executed to bind the principal might be held insufficient by another court; but all make imperative the condition that in order to bind the principal it must clearly appear upon the face of the instrument that he is the party thereto, and that the same, beyond question, has been executed for him.¹⁶

§ 108. Negotiable instruments. (a) In general. As in the case of sealed instruments, a principal will not be bound by a negotiable instrument, though executed by an agent within the scope of his authority, unless he is named therein as a party thereto.¹⁷ In construing such an instrument,

¹⁴ *Mussey v. Scott*, 7 Cush. (Mass.) 216, 54 Am. Dec. 719. Where an instrument shows on its face the names of the contracting parties, the agent may sign his own name first, adding "agent for" his principal. *Smith v. Morse*, 9 Wall. (U. S.) 76.

¹⁵ *Parks v. L. & S. Turnpike Road Co.*, 27 Ky. 456; *Spencer v. Field*, 10 Wend. (N. Y.) 87; *Bryson v. Lucas*, 84 N. C. 680, 37 Am. Rep. 634; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.

¹⁶ *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340. There is a general disposition to relax the rigid rules of the common law in regard to conveyances, and to effectuate the intention of the parties, where that can certainly be ascertained from the deed. *McClure v. Herring*, 70 Mo. 18; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123.

¹⁷ *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567, 66 Am. Dec. 390; *Fowler v. Atkinson*, 6 Minn. 578; *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132; *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39; *Stinson v. Lee*, 68 Miss. 113, 8 South. 272.

for the purpose of determining whether it is executed in behalf of a principal, greater liberality may be indulged than in the construction of sealed instruments. But on principle, the requirements are identical, and unless it appears upon the face of the instrument that the same was executed in behalf of the principal, he will not be bound thereby;¹⁸ though, as we shall presently see, a modifying doctrine has been adopted in some of the states.¹⁹ Thus, where a note read. "We the trustees of the Seventh Presbyterian Church promise to pay, etc.," and was signed by individual names followed by the designation, "Trustees," it was held that the church was not bound.²⁰ Said the court: "Although the words, 'the trustees of the Seventh Presbyterian Church' appear in the body of the note, and the word 'trustees' is appended to the signatures, there are no words used implying an undertaking on the part of the corporation."²¹ So, a note by which "I, John Franklin, President of the Mechanic Fire Insurance Company" promised to pay a sum of money, was held not to be the note of the company;²² and a note signed: "John I. Eldridge, Trustee of Sullivan Railroad," was held the personal obligation of Eldridge.²³

On the other hand, a note signed: "Joseph Talbot agent

¹⁸ *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Anderton v. Shoup*, 17 Ohio St. 125; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Ranger v. Thalman*, 178 N. Y. 574, 70 N. E. 1108.

¹⁹ Post, § 108 (b).

²⁰ *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175; *Bradlee v. Boston Glass Co.*, 16 Pick. (Mass.) 347; *Barlow v. Congregational Society*, 8 Allen (Mass.) 460; *Pack v. White*, 78 Ky. 243.

²¹ *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

²² *Barker v. Mechanic Fire Ins. Co.*, 3 Wend. (N. Y.) 94, 11 Ky.

²³ *Fiske v. Eldridge*, 12 Gray (Mass.), 474; *Foster v. Fuller*, 6 Mass. 58.

for David Perry" was held the note of Perry.²⁴ In discussing this holding, in another case, the court said: "The variation between the words 'for' and 'of' seems at first view slight; but in the connection in which they are used in signatures of this kind the difference is substantial. 'Agent of' or 'President of' a corporation named, simply designates a personal relation of the individual to the corporation. 'Agent for' a particular person or corporation, may designate either the general relation which the person signing holds to another party, or that the particular act in question is done in behalf of and as the contract of that other; and the court, if such is manifestly the intention of the parties, may construe the words in the latter sense."²⁵ But even "agent for" has been held under some circumstances a mere *descriptio personae* of the agent, as where a paper was signed "Robert Eastman, Agent for Ward 6, Lowell, Mass."²⁶ As stated by Story, however, "if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed."²⁷ And in ascertaining the true intention of the parties, many courts, as already stated, construe a negotiable instrument with

²⁴ Ballou v. Talbot, 16 Mass. 461.

²⁵ Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.

²⁶ Shattuck v. Eastman, 12 Allen (Mass.), 369; Tannatt v. Rocky Mt. Nat. Bank, 1 Colo. 278, 9 Am. Rep. 156; Exchange Bank v. Lewis County, 28 W. Va. 273. Thus, a note signed "D. H., agent for the Curchman" (a newspaper conducted by the agent on behalf of his principal) was held not to bind the principal. Dewitt v. Walton, 5 Selden (9 N. Y.), 571. So the insertion of "for" or "in behalf of" a principal, in the body of the note has been held not sufficient to bind the principal. Barlow v. Society, 8 Allen (Mass.), 460; Bradlee v. Boston Glass Co., 16 Pick. (Mass.) 347.

²⁷ Story on Promissory Notes, § 68.

greater liberality than would prevail in the case of sealed instruments.²⁸ Thus where a note was signed: "G. A. Colby, Prest. Pac. Peat Coal Co., D. K. Tripp, Sec.," and was indorsed by Colby and four others, the court held that, read as a whole, it was apparent that the note was the note of the company, indorsed by individuals.²⁹ So, a note reading: "We, as the trustees of the Methodist Church, promise to pay, etc.," was held the note of the church, though signed merely by individual names followed by the word "trustees."³⁰

A note signed by an individual as "Secretary," but impressed with the seal of a corporation, of which the individual was secretary, was held the note of the corporation;³¹ and so it was held that a check, having the words "Aetna Mills" printed in the margin, and signed "J. D. Farnsworth, Treasurer," was the check of the Aetna Mills, executed by Farnsworth as their treasurer and in their behalf.³² Other cases will be found, of course, in which commercial paper having the name of a corporation printed in the margin, and signed by the maker as agent, has been held not binding on the corporation.³³ As was said in a Massachusetts case, "the difficulty is not in ascertaining the gen-

²⁸ *Liebscher v. Kraus*, 74 Wis. 387, 43 N. W. 166; *Blanchard v. Kaull*, 44 Cal. 440; *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *New Market Sav. Bank v. Gillett*, 100 Ill. 254, 39 Am. Rep. 39; *Franklin v. Johnson*, 147 Ill. 520, 35 N. E. 480.

²⁹ *Farmers' & Mechanics' Bank v. Colby*, 64 Cal. 352.

³⁰ *Leach v. Blow*, 8 Smedes & M. (Miss.) 221; *Mann v. Chandler*, 9 Mass. 335; *Blanchard v. Kaull*, 44 Cal. 440.

³¹ *Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330; *Guthrie v. Imbrie*, 12 Ore. 182, 6 Pac. 664; *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624.

³² *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360; *Hitchcock v. Buchanan*, 105 U. S. 416.

³³ *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908.

eral principles which must govern cases of this nature, but in applying them to the different forms and shades of expression in particular instruments. A mere description of the general relation or office which the person signing the paper holds to another person, or to a corporation, without indicating that the particular signature is made in the execution of the office and agency; is not sufficient to charge the principal or to exempt the agent from personal liability."³⁴ But where a note read, "We, the undersigned, committee for the First School District, promise in behalf of said school district," and was signed by the individual members, with the word "Committee" opposite their names, it was held that the note was properly executed to bind the principal.³⁵

(b) **Parol evidence rule.** The rule discussed in the preceding subdivision has been modified in a number of states to the extent that where, upon the face of a negotiable instrument, there appears reasonable indication that the maker did not intend to bind himself, but was seeking to execute the same in behalf of another, parol evidence may be introduced to clear up the ambiguity and to show who was intended to be bound by the instrument.³⁶ Thus, where a signature in form was: "John Kean, President

³⁴ *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Olcott v. Tloga Ry. Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441; *McClellan v. Robe*, 93 Ind. 298.

³⁵ *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Mann v. Chandler*, 9 Mass. 335; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

³⁶ *Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68; *Bean v. Pioneer Mining Co.*, 66 Cal. 451, 6 Pac. 86; *Mechanics' Bank v. Bank*, 5 Wheat. (U. S.) 326; *Second Nat. Bank v. Steel Co.*, 155 Ind. 581, 58 N. E. 833; *Kline v. Bank*, 50 Kan. 91, 31 Pac. 688; *Lafin & Rand Power Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472.

Elizabethtown R. R. Co.," it was held that parol evidence was properly admitted to show that Kean contracted in behalf of the company.³⁷ In answer to the objection that the effect of such evidence was to vary the terms of the written instrument, the court said: "It is at best, upon the face of the instrument, doubtful by whom it was executed. It is not clear who was the contracting party. * * *

The evidence is not adduced to discharge the agent from a personal liability, which he has assumed, but to prove that in fact he never incurred that liability. Not to aid in the construction of the instrument, but to prove whose instrument it is."³⁸ So, where the makers of a note designated themselves "Trustees of the First Baptist Society of the Village of Brockport," it was held that though *prima facie* the individual obligation of the makers, yet parol evidence could be introduced to show that the intention of the parties was to bind the Society.³⁹ Where a note read "I promise to pay" a stated sum of money "for building a school house in District No. 3," and was signed "P. T. Reynolds, Local Director," the court held that it might be shown by parol that the note was intended to be that of the district.⁴⁰ And like rulings have been made in a number of cases.⁴¹

Even though the name of a principal does not appear

³⁷ Kean v. Davis, 21 N. J. Law, 683, 47 Am. Dec. 182; Hovey v. Magill, 2 Conn. 680; Contra, Robinson v. Kanawha Valley Bank, 44 Ohio St. 441, 8 N. E. 583; Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71.

³⁸ Kean v. Davis, *supra*.

³⁹ Brockway v. Allen, 17 Wend. (N. Y.) 40; Newman v. Greeff, 101 N. Y. 663, 5 N. E. 335.

⁴⁰ McClellan v. Reynolds, 49 Mo. 312.

⁴¹ Martin v. Smith, 65 Miss. 1, 3 South. 33; Keldan v. Winegar, 95 Mich. 430, 54 N. W. 901; Miller v. Way, 5 S. D. 468, 59 N. W. 467; Case Mfg. Co. v. Saxman, 138 U. S. 431, 11 Sup. Ct. 360.

upon the face of an instrument, but the maker merely designates himself "agent," it has been held that, at least between the original parties, parol evidence may be adduced to show that it was not their intention to bind the agent, but that he was dealt with in his representative character.⁴² Said the Supreme Court of the United States: "The ordinary rule undoubtedly is that if a person merely adds to the signature of his name the word 'agent,' 'trustee,' 'treasurer,' etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personae*. But if he be in fact a mere agent, trustee or officer of some principal, and is in the habit of expressing in that way his representative character, in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents, thus made and used, as his personal obligations contrary to the intent of the parties."⁴³ The use of such designations alone, without disclosure of a principal, would not charge third persons, into whose hands an instrument came, with knowledge of the representative character of the signer, and hence probably would not render the principal liable to them.⁴⁴ Though, were it shown that such third person had actual knowledge of the agency, and took the instrument in reliance upon it, his rights, it would seem, should be the same as those of the original holder.⁴⁵

⁴² *Lacy v. Dubuque Lumber Co.*, 43 Iowa, 510; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Burkhalter v. Perry & Brown*, 127 Ga. 438, 56 S. E. 631.

⁴³ *Metcalf v. Williams*, 104 U. S. 93.

⁴⁴ *Metcalf v. Williams*, *supra*; *Slawson v. Loring*, 5 Allen (Mass.) 340, 81 Am. Dec. 750.

⁴⁵ *Keidan v. Winegar*, 95 Mich. 430, 54 N. W. 901; *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229.

(c) **Cashier.** Even in those states where the parol evidence rule, in its entirety, is not followed, the courts hold that commercial paper signed by the cashier of a bank, who adds to his signature the word "Cashier," may be shown to have been executed in behalf of the bank.⁴⁶ The rule is frequently extended to paper signed by prudential officers of any corporation.⁴⁷ This form of signature is in accordance with business usage so well established that the paper, on its face, indicates an obligation on behalf of the bank or other corporation rather than a personal obligation of the officer who signs it.

§ 109. **Other contracts.** (a) **Undisclosed agency.** We have seen in the foregoing sections that the principal is not bound by either a sealed or negotiable instrument, executed by his agent, within the scope of his authority, unless, upon the face of such instrument, the principal appears as the party thereto; except in those states in which, under the parol evidence rule, it is competent to show by extraneous evidence that an agent acted in a representative character in executing a negotiable instrument, where upon the face of such instrument there is some indication that such is the fact. Coming now to simple non-negotiable contracts, a different rule applies. Where an agent, acting within the scope of his authority, executes a simple non-negotiable contract, apparently in his own behalf, but in reality for his principal, the principal is bound thereby, notwithstanding that the agency was undisclosed, and that the other party

⁴⁶ *McHenry v. Ridgely*, 2 Scam. (Ill.) 309, 35 Am. Dec. 110; *Comercial Bank v. French*, 21 Pick. (Mass.) 486, 82 Am. Dec. 280; *Bank of Manchester v. Slason*, 13 Vt. 334.

⁴⁷ *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71.

contracted under the belief that he was dealing with the agent personally.⁴⁸ If the contract be in writing and signed by the agent individually,—though without indication of his representative character,—extraneous evidence may be adduced to show that, as a matter of fact, he dealt in behalf of an undisclosed principal, and that the latter, therefore, is a party to the contract.⁴⁹ This is the striking doctrine of undisclosed agency, and applies even where a contract is required by the statute of frauds to be in writing.⁵⁰ To thus bring into a contract a person who does not appear as a party thereto, and who was unknown to the other contracting party, seems at first blush violative of fundamental principles of contracts. But the doctrine is firmly established in the law of agency. As was said in an English case, “There is no doubt that it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals. * * * The evidence in no way contradicts the

⁴⁸ *Woodford v. Hamilton*, 139 Ind. 481, 39 N. E. 47; *Schendel v. Stevenson*, 153 Mass. 351, 26 N. E. 689; *Lamb v. Thompson*, 31 Neb. 448, 48 N. W. 58; *Chandler v. Coe*, 54 N. H. 561; *Higgins v. Dellinger*, 22 Mo. 397; *Hillman v. Hulett*, 149 Mich. 289, 112 N. W. 918;—*Pulver v. Burke*, 56 Barb. (N. Y.) 390. Where one conducts a business in his own name, but really as agent for an undisclosed principal, the latter can not resist liability for goods sold the agent on credit, on the ground that he had given secret orders to the agent not to buy on credit. *Hubbard v. Ten Brook*, 124 Pa. St. 291, 16 Atl. 817.

⁴⁹ *Kirschbon v. Bonzel*, 67 Wis. 178, 29 N. W. 907; *Waddill v. Sebre*, 88 Va. 1012, 14 S. E. 849; *Randolph v. Wheeler*, 182 Mo. 145, 81 S. W. 419.

⁵⁰ *Lerned v. Johns*, 9 Allen (Mass.), 419; *Kinsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249.

written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but it shows that it also binds another, by reason of the fact that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal."⁵¹

(b) **Election to hold principal.** Where the contract on its face is the individual obligation of the agent, such obligation does not cease upon disclosure of a principal. The other contracting party, upon learning of the existence of an undisclosed principal, may, at his option, hold the agent to his contract, or he may elect to hold the principal.⁵² The election, it would seem, should be made within a reasonable time; and, so, once the party makes an election to hold the agent, he is irrevocably bound thereby and cannot subsequently come back on the principal.⁵³ What constitutes an election is a question of fact. Merely bringing suit has been held not conclusive;⁵⁴ but recovery of judgment might be,⁵⁵ and certainly would be, were the judg-

⁵¹ *Higgins v. Senior*, 8 M. & W. 834.

⁵² *Kinsley v. Davis*, 104 Mass. 178; *Elliott v. Bodine*, 59 N. J. Law, 567, 36 Atl. 1038; *Schweyer v. Jones*, 152 Mich. 241, 115 N. W. 974. The same right of election exists upon discovering the name of the principal where the name of the principal but not the existence of the agency is undisclosed at the time of making the contract. *Raymond v. Crown and Eagle Mills*, 2 Metc. (Mass.) 319; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174.

⁵³ *Kinsley v. Davis*, 104 Mass. 178; *Berry v. Chase*, 77 C. C. A. 161, 146 Fed. 625.

⁵⁴ *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Steele-Smith Grocery Co. v. Potthast*, 109 Iowa, 413, 80 N. W. 519; *Mussenden v. Raiffe*, 131 Ill. App. 456; Post, § 109 (c). An action of attachment against the agent has been held conclusive evidence of election to hold him. *Barrell v. Newby*, 127 Fed. 656.

⁵⁵ *Kinsley v. Davis*, 104 Mass. 178. Obtaining judgment will not constitute an election where the party was ignorant of the prin-

ment satisfied.⁵⁶ Under these rulings it would seem that an indication, by the third party, of an intention to hold the agent will not have the effect of an irrevocable election, and hence will not preclude subsequent resort to the principal, unless recovery is had against the agent, in which event the obligation of the contract ceases, or unless the principal, acting upon the appearance of an election to hold the agent, changes his position to his disadvantage. To constitute an election the party must have knowledge of the existence of the agency, and must also know who is the principal, for otherwise he would be unable to choose between principal and agent.⁵⁷ Thus, before identification of the principal, it would not constitute an election to accept the agent's note,⁵⁸ or to charge goods to him individually.⁵⁹

(c) **Settlement with agent.** Where a third party sells goods to an agent, believing him to be acting in his own behalf, but subsequently learns that he was the agent of an undisclosed principal, he may, as has been indicated, elect to resort to the principal, on the contract, for the price

principal's existence at the time of bringing suit. *Lindquist v. Dickson*, 98 Minn. 369, 107 N. W. 958.

⁵⁶ *Beymer v. Bonsall*, 79 Pa. St. 298; *Maple v. Ry. Co.*, 40 Ohio St. 313, 48 Am. Rep. 685.

⁵⁷ *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Greenberg v. Palmieri*, 71 N. J. Law, 83, 58 Atl. 297.

⁵⁸ *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Rep. 558; *Harper v. Bank*, 54 Ohio St. 425, 44 N. E. 97; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174.

⁵⁹ *Raymond v. Crown, etc.*, *Mills*, 2 Metc. (Mass.) 319; *French v. Price*, 24 Pick. (Mass.) 13; *Guest v. Burlington Opera House Co.*, 74 Iowa, 457, 38 N. W. 158; *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260.

⁶⁰ The earlier ruling in England was that settlement with the

of the goods. But if in the meantime the principal, in good faith, has settled for the goods with the agent, who failed to pay over the money, will that fact constitute a defense, or must the principal settle again with the other party? This question, though infrequently raised in America, has been the source of much interesting discussion in the English cases, which have answered it both ways.⁶⁰ Without entering into a discussion of the proposition, it may be stated as the better rule that the liability of an undisclosed principal can not be defeated by a settlement with his agent, unless such settlement was induced by some action of the other contracting party, which reasonably led the principal to believe that such settlement could safely be made; as where such other party, with knowledge of the agency, accepted the agent's personal security, or otherwise indicated that he was looking solely to the agent, or had come to a settlement with him.⁶¹

On principle it would seem that the rule herein laid down, and the doctrine of election, discussed in the preceding subdivision, are so closely allied as to warrant statement in a single formula;—namely, that the liability of an undisclosed principal, upon a contract, continues until such obligation has been met, either by himself or by the agent;

agent would constitute a defense. *Thomas v. Davenport*, 9 B. & C. 78. This holding has apparently been accepted in some of the American cases. *Fradley v. Hyland*, 37 Fed. 49; *Thomas v. Atkinson*, 38 Ind. 248. The later English cases support the doctrine that settlement with the agent will constitute a defense only where it was induced by conduct of the other party. *Irvine v. Watson*, 5 Q. B. D. 102.

⁶⁰ *York County Bank v. Stein*, 24 Md. 446; *Schepflin v. Dessar*, 20 Mo. App. 569; *Hyde v. Wolf*, 4 La. 234, 23 Am. Dec. 484; *Mecham on Agency*, § 697.

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or until the other contracting party, with knowledge of the principal's identity, has by some indication of an election to hold the agent, induced the principal to settle with the agent, or otherwise to change his position to his disadvantage. In short, the liability of an undisclosed principal continues until the obligation of the contract has been met, or until the other contracting party, by his conduct, is estopped to assert the liability.⁶²

§ 110. **Agent's liability.** As indicated in our discussion, the agent of an undisclosed principal is liable on the contract at the option of the other contracting party. So, in the case of sealed and negotiable instruments, where the agent describes himself as such, but the execution is not technically sufficient to bind the principal, the agent will be bound if, upon its face, the contract can be construed as his personal obligation. In this chapter, however, we have been concerned solely with the liability of the principal, and shall reserve for separate discussion the question of the agent's liability.⁶³

⁶² *Henry Ames Packing Co. v. Tucker*, 8 Mo. App. 95; *Davis v. McKinney*, 46 Tenn. 15; *Rathbone v. Tucker*, 15 Wend. (N. Y.) 498; *Beymer v. Bonsall*, 79 Pa. St. 298. Where the party knows the principal and yet chooses to take the contract of the agent individually, he is bound by his election and cannot afterward hold the principal. *In re Bateman*, 145 N. Y. 623, 40 N. E. 10.

⁶³ Post, Chap. XIII.

✓ CHAPTER XI.

ADMISSIONS—NOTICE—LIABILITY OF PRINCIPAL FOR TORTS AND CRIMES OF AGENT.

§ 111. Scope of chapter.

I. *Admissions.*

112. In general.

113. Admissions by agent.

(a) In general.

(b) Authorized statements.

(c) Statements part of transaction.

114. *Res gestae.*

II. *Notice.*

115. In general.

116. Notice to agent.

(a) In general.

(b) Exceptions to rule.

III. *Principal's liability for tort of agent.*

117. In general.

118. Master and servant.

119. Principal and agent.

120. Fraud.

(a) In general.

(b) Not for principal's benefit.

IV. *Principal's liability for agent's crimes.*

121. In general.

122. Assent of principal.

(a) In general.

(b) Statutory offenses.

§ 111. Scope of chapter. In this chapter, we shall discuss the legal effect upon a principal of notice to his agent, and of admissions made by an agent in the performance of his agency. Also, the liability of a principal for torts

and crimes committed by his agent. The determination of these questions merely involves an application to different sets of facts of the principles of agency already discussed. Some knowledge, on the part of the student, of the doctrine of notice and admissions, as well as of the law of crimes and torts, must, perforce, be assumed.

Ex. I. *Admissions.* *not used.*

§ 112. *In general.* It is a rule of the law of evidence that statements of fact, material to the issue, made by a party to an action, and adverse to his interest, may be introduced in evidence against him.¹ The question with which we are concerned is whether a statement made by an agent may be so far deemed the statement of the principal as to allow its introduction in evidence against the principal, where it would have been admissible, as an admission, if made by the principal himself.

§ 113. *Admissions by agent. (a) In general.* Just as an act performed by an agent, within the scope of his authority, and in execution of it, is deemed the act of the principal, and is binding upon him; so, a statement made by an agent, within the scope of his agency, and in furtherance of it, is deemed the statement of the principal, and may be used against him.² This, of course, does not mean that all statements made by an agent, while engaged in perform-

¹ Jones on Evidence, Chap. IX.

² Vicksburg, etc., Ry. v. O'Brien, 119 U. S. 99; Western Mining Co. v. Toole, 2 Ariz. 82, 11 Pac. 119; Ferguson v. Hamilton, 35 Barb. (N. Y.) 427; White v. Miller, 71 N. Y. 134, 27 Am. Rep. 13; Wilson Sewing Mach. Co. v. Sloan, 50 Iowa, 367. Where the acts of the agent will bind the principal, his representations, respecting the subject matter, made while he is transacting the business and exercising his authority, will also bind the principal. Hartford Ins. Co. v. Sherman, 223 Ill. 329, 78 N. E. 923.

ance of his agency, are statements of his principal. The statements must be of a character such as the agent, in the performance of his duty, is authorized to make; or it must be so closely connected with, and in furtherance of, some authorized transaction as to be practically a part of such transaction,—or, as frequently put, part of the *res gestae*.³

(b) **Authorized statements.** It may frequently be in the line of an agent's duty to impart information, or to make statements of fact, within his knowledge; and while in performance of such duty, his statements are clearly binding on his principal, notwithstanding that they subsequently may prove prejudicial to the interest of the principal. Thus, where a person refers another to an agent for information upon a particular matter, the statement of such agent, in reference thereto, may be introduced as an admission against the principal.⁴ So, where it was the duty of a station master to deliver baggage to passengers, or to account for the same, a statement by such official, in accounting for the loss of a trunk, made shortly thereafter, and in the line of his duty, would be admissible against the railway company.⁵ And, in an English case, where a par-

³ U. S. v. Gooding, 12 Wheat. (U. S.) 460; Thalhimer v. Brinkerhoff, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155; Marshall v. Haney, 4 Md. 498, 59 Am. Dec. 92; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Fogg v. Pew, 10 Gray (Mass.), 409, 71 Am. Dec. 662; McPherrin v. Jennings, 66 Iowa, 622, 24 N. W. 242; Nat. Bldg. Assn. v. Quin, 120 Ga. 358, 47 S. E. 962. Under authority to settle with a debtor, threats of unlawful imprisonment, made to procure a settlement, are within the scope of such agent's authority. Mitchell v. Finnell, 101 Cal. 614, 36 Pac. 123.

⁴ Chapman v. Twitchell, 37 Me. 59, 58 Am. Dec. 773; Over v. Schiffin, 102 Ind. 191, 26 N. E. 91; Proctor v. Ry. Co., 154 Mass. 251, 28 N. E. 13.

⁵ Morse v. Ry. Co., 6 Gray (Mass.), 450; Lane v. Ry. Co., 112 Mass. 455; Nichols v. So. Pac. Ry. Co., 23 Ore. 123. Railway com-

cel was lost in transit, and a station master, in the course of his duty, gave information to the police as to the absconding of a porter, suspected of taking it, his statements were held admissible against the company, on the issue as to whether the parcel was stolen by one of its servants.⁶ And, so, in an action against a railway for damages resulting from an accident caused by spreading rails, it was held that a statement, as to the condition of the rails, made shortly before the accident, to a superior officer, by the track walker, in the course of his duty, was admissible against the company.⁷

(c) **Statements part of transaction.** Though resting on the same principle, we may put into a different class those cases in which statements of an agent are admitted against the principal because made by the agent in furtherance of some authorized transaction. Here, it is necessary that the statements be so closely connected with the act performed, or the contract made, as to be a part of the transaction,—part of the *res gestae*,—and, consequently, statements made independently of the transaction, and not in furtherance of it, or after its completion, would not be admissible against

panies are not responsible for declarations or admissions of any of their servants beyond the immediate sphere of their agency and during the transaction of the business in which they are employed. *Missouri Pac. Ry. Co. v. Stults*, 31 Kan. 752, 3 Pac. 522.

⁶ *Kirkstall Brewing Co. v. Furness Ry. Co.*, L. R., 9 Q. B. 468.

⁷ *Texas & P. Ry. Co. v. Lester*, 75 Tex. 56, 12 S. W. 955. See *Keyser v. Railway Co.*, 66 Mich. 390, 33 N. W. 867; *Meyer v. Insurance Co.*, 104 Cal. 381, 38 Pac. 82; *North Hudson Ry. Co. v. May*, 48 N. J. Law. 401, 5 Atl. 276. Where an attorney is employed to enforce a claim for damages against a railway company, and to obtain a settlement, if possible, without suit, a letter written by him to the company, stating what purports to be the facts in the case, in response to an inquiry by the company, is admissible

the principal.⁸ Thus, in an action for purchase money, statements of vendor's agent, made during negotiation of the sale, may be shown;⁹ and in an action for refusing to accept merchandise sold, declarations of defendant's agent, while weighing and receiving the goods, as to their quantity or quality, would be admissible.¹⁰ So, the statement of an officer of a corporation, respecting a transaction in controversy, would be admissible against the company, if made while the transaction was in progress, notwithstanding that it extended over a considerable period of time.¹¹ And in an action to recover a statutory penalty for selling coal short measure, it was held, in an English case, that statements by defendant's agent, who made the sale, in reference thereto, and as part of the transaction, were admissible in evidence.¹² So upon the trial of the owner of a vessel for engaging in the slave trade, statements by the master of the ship, that the voyage was for that purpose, were admissible against the defendant, where made to a person whom the master in pursuance of authority, was seeking to employ as mate for the voyage, which was then in progress.¹³ But on the other hand, statements by an agent concerning

against the client. *Loomis v. Ry. Co.*, 159 Mass. 39, 34 N. E. 82. See *Fletcher v. Ry. Co.*, 109 Mich. 363, 67 N. W. 330.

⁸ *White v. Miller*, 71 N. Y. 134, 27 Am. Rep. 13; *Phelps v. James*, 36 Iowa, 398, 53 N. W. 274; *Idaho Forwarding Co. v. Insurance Co.*, 8 Utah, 41, 29 Pac. 826; *Luby v. Railway Co.*, 17 N. Y. 131; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 41 Am. Rep. 17; *Brooks v. Jameson*, 55 Mo. 505.

⁹ *Wiggins v. Leonard*, 9 Iowa, 194; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598.

¹⁰ *Rahm v. Deig*, 121 Ind. 283.

¹¹ *Xenia Bank v. Stewart*, 114 U. S. 224; *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa, 364.

¹² *Peto v. Hague*, 5 Esp. 134.

¹³ *United States v. Gooding*, 12 Wheat. (U. S.) 460.

completed transactions would be inadmissible against the principal;¹⁴ and, thus, statements by the president of a corporation, as to his company's former dealings, which statements were not made in performance of his duties, or in transaction of business contemporaneous with them, would not be binding upon the corporation.¹⁵

§ 114. *Res gestae*. The rules under discussion form a part of the law of evidence, and hence we find them stated, in many cases, in the terms of that branch of the law. Thus, it is generally laid down that statements of an agent are admissible because they form part of the *res gestae*, without the further explanation that, being part of the *res gestae*, they may be deemed authorized statements, and for that reason binding on the principal.¹⁶ The *res gestae* doctrine, briefly, is that declarations, contemporaneous with some transaction, or with the happening of some event, and in explanation thereof, made so spontaneously as to preclude the idea of premeditation, may be considered part of the circumstances that surround such act or event, and as such, may be introduced in evidence as part of the act or event itself,—part of the *res gestae*.¹⁷ Applying this

¹⁴ *Northwestern Packet Co. v. Clough*, 20 Wall. (U. S.) 528; *Fort Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106; *Ruschenberg v. Southern Electric Ry. Co.*, 161 Mo. 70, 61 S. W. 626; *Vicksburg Ry. Co. v. O'Brien*, 119 U. S. 99. Thus, a conversation between agents of a railway company, concerning a past transaction, is clearly inadmissible against the company. *Union Pac. Ry. Co. v. Fray*, 35 Kan. 700; *Erie, etc., Ry. Co. v. Smith*, 125 Pa. St. 259.

¹⁵ *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600; *Goetz v. Bank*, 119 U. S. 551.

¹⁶ *United States v. Gooding*, 12 Wheat. (U. S.) 460; 1 Greenl. Evidence, § 113.

¹⁷ *Jones on Evidence*, Chap. II.

doctrine to the question of the 'admissibility of agents' statements, many of the courts reason that, the authority of an agent to perform an act, or to negotiate a contract, being established statements made by the agent, in the course of the performance of his agency, and in relation thereto, constitute part of such performance; and since what the agent did, is admissible in evidence, what he said while doing it, may also be introduced if it elucidates the act, is contemporaneous with it, is part, in short, of the act itself.¹⁸

Basing the admissibility of an agent's statements upon the rule of *res gestae* is less satisfactory than resting it squarely upon the doctrine that where an agent is authorized to negotiate a transaction, he acts within the scope of his authority in making statements connected therewith, and in furtherance thereof, and hence binds his principal by them. It also tends to confusion. In many cases, declarations of an agent or employee are admissible against the principal on the ground of *res gestae*, where the fact of his being an agent is immaterial, and the same statements would be admissible though made by a stranger. Thus, in the case of a railway accident, declarations by a trainman, made spontaneously, immediately thereafter, as to the cause of the accident, would be admissible against the company; not because of the relation existing between him and the company, nor because of any authority to speak in behalf of the company, but because the declarations were part of the *res gestae*.¹⁹ Like declarations by a passenger, who was

¹⁸ Texas & P. Ry. Co. v. Lester, 75 Tex. 56, 12 S. W. 955; Keyser v. Chicago, etc., Ry. Co., 66 Mich. 390, 33 N. W. 867; Story on Agency, § 134.

¹⁹ Ohio, etc., Ry. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 19 L. R. A. 733. "If the declarations were part of the *res gestae*, they

injured, though they were beneficial to himself, would, on the same ground, be admissible in an action brought by him against the company.²⁰ It is clear that the statements of a vendor's agent, for instance, made during negotiation of a sale, are admissible on essentially different grounds from those justifying the introduction of the declarations of the trainman or the passenger in the cases last cited. In the one case the admissibility depends on existence of authority in an agent to bind his principal by acts and words; in the other cases, agency is not involved, but under the rules of evidence the declarations, by whomsoever made, are admissible because they constitute part of the concurrence in controversy. It only leads to confusion to say that in all three cases, the declarations, in question, are admitted upon the same ground, namely because part of the *res gestae*. Hence, we have stated the rules, governing admission of agents' statements, in the terms of agency, and have based their admissibility against the principal on the ground that being made within the scope of the agent's authority they are binding upon the principal because in legal effect his statements.

II. Notice.

§ 115. In general. It is, in brief, a doctrine of equity jurisprudence that a person who acquires a title or interest in a given subject matter, which is already affected by an equitable claim or interest in favor of another, will take subject to the same, provided, that at the time he had notice, were competent, no matter by whom they were made." Elliott, C. J.

²⁰ In an action by an administrator against a railway company for damages for decedent's death, declarations of decedent, made immediately after he was injured, and while he was being extricated from under the wheels of the car, were admissible against

actual or constructive, of such adverse claim or interest.²¹ The question with which we are here concerned is whether notice to an agent may be imputed to his principal, so as to affect the latter's rights the same as they would have been affected had he himself had notice.

§ 116. Notice to agent. (a) In general. Where notice of an adverse interest or claim is acquired by an agent during negotiation, for his principal, of the transaction affected by the notice, there can be no doubt but that such notice will be imputed to the principal;²² either upon the broad ground of the legal identity of principal and agent;²³ or upon the theory of the agent's duty to communicate to his principal knowledge of facts which affect the transaction.²⁴ Where, however, notice had been acquired by the agent in a previous or different transaction, some of the cases

the defendant, as part of the *res gestae*. Louisville, etc., Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520.

²¹ Pomeroy on Equity, § 591.

²² *Suit v. Woodhall*, 113 Mass. 391; *Campau v. Konan*, 39 Mich. 362; *Pacific Lumber Co. v. Wilson*, 6 Cal. App. 561, 92 Pac. 654; *Connelly's Ex'r v. Beckett*, 32 Ky. Law Rep. 356, 105 S. W. 446; *Jacquith v. Davenport*, 191 Mass. 415, 78 N. E. 93. Notice to an agent who purchases a note that is tainted with usury is notice to his principal. *Haynes v. Gay*, 37 Wash. 230, 79 Pac. 794.

²³ *Irvine v. Grady*, 85 Tex. 120, 19 S. W. 1028; *Advertiser Tribune Co., v. Detroit*, 43 Mich. 116.

²⁴ *The Distilled Spirits*, 11 Wall. (U. S.) 356; *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756. It is presumed that agents will communicate to their principals facts material to the principal's interests; and their knowledge, therefore, becomes the knowledge of the principal. *Traders' & Truckers' Bank v. Black*, 108 Va. 59, 60 S. E. 743.

²⁵ *Houseman v. Association*, 81 Pa. St. 256; *Barbour v. Wiehle*, 116 Pa. St. 308, 9 Atl. 520; *McCormick v. Joseph*, 83 Ala. 401, 3 South. 796.

have held that such notice could not be imputed to the principal; since notice acquired before the relation existed would amount to no more than notice acquired after it had ceased.²⁵ It seems now the accepted rule that actual information acquired by an agent prior to the agency, but present in his mind while acting for the principal, and material to the business delegated, will be deemed notice to the principal.²⁶ It would be necessary to establish, by at least presumptive evidence, that the information acquired by the agent in a previous transaction was present to his mind and memory while engaged in the subsequent business for his principal.²⁷

(b) **Exceptions to rule.** Two exceptions to the doctrine under discussion are to be noted. It is generally held that knowledge possessed by an agent will not be imputed to his principal, where it was acquired by the former, confidentially, as attorney for another, so that its disclosure would involve a breach of professional secrecy.²⁸ So, where an agent in the course of his employment, for his own benefit, perpetrates a fraud upon the principal, and such fraud

²⁵ *The Distilled Spirits*, 11 Wall. (U. S.) 356; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Constant v. University*, 111 N. Y. 604, 19 N. E. 631; *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45; *Henry v. Omaha Packing Co.* (Neb.), 115 N. W. 777; *Vulcan Detinning Co. v. American Can Co.* (N. J. Eq.), 67 Atl. 339.

²⁷ *St. Paul Fire, etc., Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240; *Constant v. University*, 111 N. Y. 604, 19 N. E. 631; *Yerger v. Barz*, 56 Iowa, 77, 8 N. W. 769; *Merchants' Nat. Bank v. Nichols*, 223 Ill. 41, 79 N. E. 38. It would be sufficient to show that the information was acquired so recently as necessarily to raise the inference that it remained fixed in the agent's memory. *Chouteau v. Allen*, 70 Mo. 290; *Brothers v. Bank*, 84 Wis. 381, 54 N. W. 786.

²⁸ *The Distilled Spirits*, 11 Wall. (U. S.) 367; *Abell v. Howe*, 43 Vt. 403; *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Haven v. Snow*, 14 Pick. (Mass.) 28; *Constant v. University*, 111 N. Y. 604, 19 N. E. 631.

involves the necessity of concealing facts from him, notice of the facts, thus fraudulently concealed, will not be imputed to the principal.²⁹

III. *Principal's Liability for Tort of Agent.*

§ 117. **In general.** A person is liable in damages for his torts whether committed personally or by the hand of an agent;³⁰ and, as we have seen, this liability may arise from ratification, as well as from precedent authorization, of a wrongful act done by one person in behalf of another.³¹ So, even in cases where authorization of a wrongful act can not be shown, liability may arise, within prescribed limits, from the existence between two persons of such a relation as to make one responsible for the acts of the other.³²

§ 118. **Master and servant.** Broadly stated, a master is liable not only for such torts of his servant as he may be said to have authorized, but also for wrongful acts, unau-

²⁹ *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282; *American Surety Co. v. Pauly*, 170 U. S. 133; *Allen v. Railway Co.*, 150 Mass. 200, 22 N. E. 917; *Traders' & Truckers' Bank v. Black*, 108 Va. 59, 60 S. E. 743; *Sebald v. Citizens' Bank*, 31 Ky. Law Rep. 1244, 105 S. W. 130. Notice to an agent is not imputed to his principal, where the presumption that the agent will communicate his knowledge is rebutted by the fact of his adverse interest. *Booker v. Booker*, 208 Ill. 529, 70 N. E. 709.

³⁰ *Cooley on Torts*, Chap. XVIII.

³¹ *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279; *Ante* § 54 (c).

³² *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595. "The rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

thorized, or even expressly forbidden, but committed by the servant within the scope of his employment and in furtherance of it.³³ Thus, if a servant, employed to drive a wagon, is guilty of negligence in driving at a high rate of speed, the master would be liable, notwithstanding that he had ordered the servant to drive slowly; provided, of course, that at the time, the servant, in a general way, was engaged in the master's business.³⁴

§ 119. Principal and agent. The liability of a principal for his agent's torts is deemed, on principle, the same as that of a master for his servant's wrongs; but in most of the cases cited to establish a principal's liability, the relation existing is really that of master and servant.³⁵ The scope of an agent's authority is necessarily so very narrow, compared to the scope of a servant's employment, that even though the liability be the same, a principal much less frequently can be deemed responsible for his agent's wrongful acts than can a master for the torts of his servant.³⁶ Where a principal authorizes the commission of a

³³ *Railway Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881; *Potulni v. Saunders*, 37 Minn. 517, 35 N. W. 379.

³⁴ *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193; *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29; *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451.

³⁵ *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175; *Mulvehill v. Bates*, 31 Minn. 364, 17 N. W. 959; *Owensboro Wagon Co. v. Bolling*, 32 Ky. Law Rep. 816, 107 S. W. 264; *Barree v. Cape Girardeau*, 197 Mo. 382, 95 S. W. 330.

³⁶ Using the term in its strictest sense, an agent is employed to bring his principal into business or contractual relations with others; few tortious acts would come within the scope of such employment. Frequently an agent's duties broaden into those of a servant, as where a person employed to sell goods is intrusted with a wagon to drive from house to house. Here the employer's

fraud or other tort by his agent, or ratifies the same after commission, the wrongful act is his, and he clearly is liable therefor.³⁷ So, if in the performance of an agency, and in furtherance thereof, a tort is committed, incident to such performance, the wrong may be deemed the act of the principal.³⁸ Thus, where a clerk in a store negligently discharges a gun, which he is selling, the principal would be liable for resulting damages.³⁹ Where it was part of the duty of a ticket agent, in a general passenger office, to post notices pertaining to business therein conducted, and such agent posted an extract from a newspaper, which constituted a libel upon a neighboring ticket broker, it was held that the company was liable.⁴⁰ And the ruling was the same where a ticket agent, believing that a spurious bill had been passed upon him in exchange for a ticket and good money in change, wrongfully caused the purchaser's arrest.⁴¹ So, where an attorney in the conduct of a suit

liability broadens correspondingly. See *Singer Mfg. Co. v. Rahn*, 132 U. S. 518.

³⁷ *State v. Smith*, 78 Me. 260, 57 Am. Rep. 802; *Harrington v. Hall* (Del.), 63 Atl. 875; *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279.

³⁸ *Allen v. Publishing Co.*, 81 Wis. 120, 50 N. W. 1093; *Turner v. Insurance Co.*, 55 Mich. 236, 21 N. W. 326; *Grand Rapids, etc., Ry. Co. v. King*, 41 Ind. App. 701, 83 N. E. 778; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338. Where a mortgagee directs an agent to make seizure of property under a chattel mortgage, he is liable for misconduct of the agent in making the seizure. *Williams v. Tolbert*, 76 S. C. 211, 56 S. E. 908.

³⁹ *Garretzen v. Duenkel*, 50 Mo. 104, 11 Am. Rep. 405.

⁴⁰ *Fogg v. Railway*, 148 Mass. 513, 20 N. E. 109. See *Pennsylvania Iron Works v. Henry Voght Mach. Co.*, 29 Ky. Law Rep. 861, 96 S. W. 551; *Hoboken Printing Co. v. Kahn*, 59 N. J. Law, 218, 35 Atl. 1053; *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 43 South. 210.

⁴¹ *Palmer v. Railway Co.*, 133 N. Y. 261, 30 N. E. 1001. But, if

wrongfully causes a seizure of property, the client would be liable in damages.⁴²

§ 120. **Fraud.** (a) **In general.** Since the purpose of most agencies is to bring the principal into contractual relations with third persons, the liability of a principal for tort of an agent usually arises in cases where the agent practiced fraud in negotiating a contract. It is clear that where a principal authorizes the fraud, as where he directs his agent to make false representations, the fraud is his, and he is liable. But the liability will arise, though the principal be innocent, where the agent, in practicing the fraud, acted within the scope of his employment, and in furtherance of it, or, to use terms of agency, where he acted within the scope of his authority, real or apparent.⁴³ Thus, where an agent authorized to sell property makes false representations concerning the same, for the purpose of inducing a person to buy, the principal is liable for the fraud.⁴⁴

the agent, from a sense of public duty, accepts what he believes to be counterfeit money in order to cause the arrest, he is not acting in furtherance of his employment, and the company is not liable. *Mulligan v. Railway*, 129 N. Y. 506, 29 N. E. 952. See *Larson v. Association*, 71 Minn. 101, 73 N. W. 711.

⁴² *Foster v. Wiley*, 27 Mich. 245, 15 Am. Rep. 185. "A client who puts his claim into the hands of an attorney for suit is presumed to authorize such action as the latter in his superior knowledge of law may decide to be legal." Cooley, J.

⁴³ *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Yeoman v. McClenahan*, 190 N. Y. 121, 82 N. E. 1086; *Griswold v. Gebbie*, 126 Pa. St. 353, 17 Atl. 673; *Cate v. Blodgett*, 70 N. H. 316, 48 Atl. 281.

⁴⁴ *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14; *Kendrick v. Colyar*, 143 Ala. 597, 42 South. 110; *Millard v. Smith*, 119 Mo. App. 701, 95 S. W. 940; *Hopkins v. Insurance Co.*, 57 Iowa, 203, 10 N. W. 605. Some of the cases hold that an action for deceit will not lie against an innocent principal. *Kennedy v. McKay*, 45 N. J.

The agent is presumed to possess authority to make such representations as usually accompany such transactions as that in which he is engaged;⁴⁵ and, furthermore, having given an agent authority, "the principal is responsible for the fraudulent, as well as the fair, means used by the agent, if they are in the line of accomplishing the object of the agency."⁴⁶

(b) **Not for principal's benefit.** Where an agent uses his position as such, to perpetrate an independent fraud for his own benefit, the wrongful act clearly is not in furtherance of the agency, and hence, it would seem, should in no way be imputed to the principal. On this proposition there is conflict of authority.⁴⁷ Thus, where a freight agent, authorized to issue bills of lading, upon receipt of goods for shipment, fraudulently issues such a bill, where no goods have been received, and the same comes into the hands of a *bona fide* purchaser, it has been held by the Supreme Court of the United States that the railway company would not be liable.⁴⁸ "The fraud," said the court,

Law, 288; *Keefe v. Sholl*, 181 Pa. St. 90, 37 Atl. 116. But the fraud always will constitute a defense to the contract.

⁴⁵ *Hartford Ins. Co. v. Sherman*, 223 Ill. 329, 78 N. E. 923; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261. An owner of land is bound by representations of his agent in negotiating a lease thereof. *Finch v. Causey*, 107 Va. 124, 57 S. E. 562.

⁴⁶ *Wolfe v. Pugh*, 101 Ind. 293. See *Western Cottage Piano Co. v. Anderson*, 45 Tex. Civ. App. 513, 101 S. W. 1061.

⁴⁷ *National Bank of Commerce v. Railway*, 44 Minn. 224, 46 N. W. 342; *Dean v. King*, 22 Ohio St. 118; *Louisiana Nat. Bank v. Lavelle*, 52 Mo. 380; *Bank of Batavia v. Railway Co.*, 106 N. Y. 195, 12 N. E. 433; *Brooke v. Railway Co.*, 108 Pa. St. 529, 1 Atl. 206; *Keyser v. Hinkle*, 127 Mo. App. 62, 106 S. W. 98.

⁴⁸ *Freidlander v. Railway Co.*, 130 U. S. 416; *The Freeman v. Buckingham*, 18 How. (U. S.) 182; *National Bank of Commerce v. Railway Co.*, 44 Minn. 224, 46 N. W. 342.

"was within the scope of the agent's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived no benefit from the unauthorized and fraudulent act, can not be made responsible."⁴⁹ By invoking the doctrine of estoppel, however, other courts, in analogous cases, hold the principal to liability.⁵⁰ Thus, where the secretary of a corporation, who was also its agent for the transfer of stock, and was authorized to countersign and issue stock, when signed by the president, forged the latter's name and fraudulently issued a certificate to a confederate, it was held that the corporation was liable in damages to a *bona fide* purchaser.⁵¹ To like effect was the ruling in an earlier case, where the officer of a corporation, authorized to issue stock, fraudulently, and for his own benefit, issued certificates in excess of the amount which the corporation was authorized to issue, and caused them to be sold by the transferee to a *bona fide* purchaser.⁵² Said the court: "Where the principal has clothed his agent with power to do an act, resting upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent authority, may rely upon the representation, and the principal is estopped from denying its truth

⁴⁹ Freidlander v. Railway Co., *supra*.

⁵⁰ Bank of Batavia v. Railway Co., 106 N. Y. 195, 12 N. E. 433; Brooke v. Railway Co., 108 Pa. St. 529, 1 Atl. 206; Savings Bank v. Railway Co., 20 Kan. 519.

⁵¹ Fifth Ave. Bank v. Railway Co., 137 N. Y. 231, 33 N. E. 378.

⁵² New York, etc., Ry. Co. v. Schuyler, 34 N. Y. 30.

to his prejudice.”⁵³ In short, when one of two innocent persons must suffer by the act of a third, he who has enabled the third person to occasion the loss should sustain it. Thus, where the agent of a telegraph company sent a forged message, by which a person was defrauded, the company was held liable.⁵⁴

IV. *Principal's Liability for Agent's Crimes.*

§ 121. In general. Since existence of criminal intent is necessary to constitute liability for criminal acts, neither a master, nor a principal, can be held criminally liable for crimes of a servant, or agent, unless he precedently authorized or assented to the act.⁵⁵ For the same reason, criminal liability can not arise from ratification.⁵⁶ If the agent be innocent, the principal alone is liable for crimes which he instigates;⁵⁷ but if both are guilty, the relation becomes that of principal and accessory, and the liability is joint.⁵⁸

⁵³ New York, etc., Ry. Co. v. Schuyler, *supra*. An estoppel would not arise in favor of one who purchased directly from the agent. Bank of New York, etc., Ass'n v. Trust Co., 143 N. Y. 559, 38 N. E. 713. Nor would it arise unless the agent was acting within an apparent authority; thus, where surrendered certificates were delivered for cancellation to the manager of a corporation who transferred them to a purchaser, the corporation was not liable. Knox v. American Co., 148 N. Y. 441, 42 N. E. 988.

⁵⁴ McCord v. Telegraph Co., 39 Minn. 181, 39 N. W. 315.

⁵⁵ Com. v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; Com. v. Briant, 142 Mass. 463, 8 N. E. 338; State v. Bacon, 40 Vt. 456; State v. James, 63 Mo. 570. Knowledge of the act will not render the principal liable, if it was done without his consent. Com. v. Putnam, 4 Gray (Mass.), 16.

⁵⁶ Morse v. State, 6 Conn. 9; Ante, § 54 (c).

⁵⁷ Com v. Hill, 11 Mass. 135; State v. Learned, 41 Vt. 585; Gregory v. State, 26 Ohio St. 510; State v. Wyckoff, 31 N. J. Law. 65. As where a person puts poison into the hand of a child and directs him to administer it.

⁵⁸ People v. Lyon, 99 N. Y. 210; McClain Crim. Law, § 204.

§ 122. **Assent of principal.** (a) **In general.** Assent of the principal must be actually shown, and can not be inferred from the fact of employment to conduct a lawful business.⁵⁹ In cases of sale of libelous books, or commission of criminal nuisances, where the nuisance is the natural consequences of the business engaged in, prior assent may be presumed.⁶⁰ And, so, frequently in cases of sale of liquor without license.⁶¹

(b) **Statutory offenses.** In cases of certain police regulations, punishment may be imposed irrespective of intent to violate them; on the theory that they impose an absolute duty upon particular persons to see that prohibited acts are not committed.⁶² Thus, where a statute forbids the opening of saloons on Sunday, its penalty is usually held to be denounced against the person whose saloon is open, and may be enforced against him, notwithstanding that the saloon was kept open by an agent without his assent.⁶³

⁵⁹ *Hipp v. State*, 5 Blackf. (Ind.) 149; *Sloan v. State*, 3 Ind. 312; *State v. Smith*, 10 R. I. 258.

⁶⁰ *Com. v. Morgan*, 107 Mass. 199; *State v. Mason*, 26 Ore. 273. 38 Pac. 130; *Com. v. Gray*, 150 Mass. 327, 23 N. E. 47; *Hipes v. State*, 73 Ind. 39; *Reg. v. Stepehen L. R.*, 1 Q. B. (Eng.) 702.

⁶¹ *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *State v. Wentworth*, 65 Me. 234; *State v. O'Connor*, 58 Minn. 193, 59 N. W. 999. The presumption is *prima facie* only and may be rebutted. *Com. v. Park*, 1 Gray (Mass.) 553; *People v. Parks*, 49 Mich. 333; *Com. v. Joslin*, 158 Mass. 482, 33 N. E. 653.

⁶² *Carroll v. State*, 63 Md. 551, 3 Atl. 29; *State v. Denoon*, 31 W. Va. 122, 5 S. E. 315; *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103; *McClain Crim. Law*, § 189.

⁶³ *State v. Roby*, 52 Mich. 577, 18 N. W. 365; *Com. v. Kelly*, 140 Mass. 441, 5 N. E. 834. Statutes frequently make punishable a sale by any person, his servant or agent. *State v. Stewart*, 81 Me. 515; *State v. McCance*, 110 Mo. 398, 19 S. W. 648.

✓ CHAPTER XII. *Liability*

LIABILITY OF THIRD PERSON TO PRINCIPAL

- § 123. In general.
- 124. Sealed and negotiable instruments.
- 125. Other contracts.
 - (a) Liability to undisclosed principal.
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- 126. Defenses.
 - (a) In general.
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- 127. Money paid through mistake.
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 - (a) In general.
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 - (c) Money and negotiable instruments.
- 129. Following trust funds.
- 130. Fraud.
 - (a) In general.
 - (b) Collusion with agent.
- 131. Causing loss of service.

§ 123. In general. Obligations of contract are always reciprocal. Hence, where a principal is bound by contract, made through an agent, with a third person, the latter, of course, is reciprocally bound. In those cases where an agent, acting within the scope of his authority, properly executes a contract in the name of the principal, the principal alone is bound by such contract to the third person, and the third person in turn is liable thereon to the principal and to no one else.¹ The situation is the same as

¹ Sharp, v. Jones, 18 Ind. 314, 81 Am. Dec. 359; Lamson & Goodnow Mfg. Co. v. Russell, 112 Mass. 387.

it would have been had the principal acted in person. Hence liability on such a contract is subject to such defenses as could have been made had the principal dealt in person. Thus, if the contract had been induced by fraud of the agent, the third party may defend on that ground.³ And so, as we have seen, notice to an agent of adverse rights, affecting the transaction, may usually be imputed to the principal.⁴

§ 124. Sealed and negotiable instruments. As was fully explained in an earlier chapter, a principal is not bound by a sealed or negotiable instrument, though executed for him by his agent, unless he appears upon the face of such instrument as the party thereto.⁴ Where the principal is not bound to the third person by virtue of such an instrument, the third person, of course, is not bound thereby to the principal.⁵

§ 125. Other contracts. (a) Liability to undisclosed principal. As we have already seen, where an agent executes a simple contract, other than a negotiable instrument, in his own name, but in behalf of an undisclosed principal, the third person, upon discovery of the latter's existence, may, at his option, elect to hold such principal.⁶ This

✓ ³ *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Mundorff v. Wickersham*, 63 Pa. 87, 3 Am. Rep. 531; *Union Trust Co. v. Phillips*, 7 S. D. 225, 63 N. W. 903; Ante § 120.

⁴ Ante § 116.

⁴ Ante § 107.

— ⁵ *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Henricus v. Engleert*, 137 N. Y. 488, 33 N. E. 550. A person not a party to a sealed contract can not show that the party thereto acted as agent for him. *Elliott v. Brady*, 192 N. Y. 221, 85 N. E. 69.

⁶ Ante § 109.

right, again, involves a reciprocal obligation. The principal, in turn, may disclose himself, assume the position of the real party to the contract, and enforce against such third person the obligations thereof.⁷ Before such disclosure, the third person may, with safety, deal with the agent as the real party to the contract; but after notice of a principal's existence, settlement with the agent would be made at peril.⁸ Until appearance of the principal, the agent may enforce the contract, but his right is subservient to that of the principal who, even after suit has been started by the agent, may intervene and assert his superior position as the real party to the contract.⁹

(b) **Principal excluded.** As is evident from our discussion, a person who enters into a simple contract, other than a negotiable instrument, takes the chance of ultimately finding himself bound by the same to a person other than the one with whom he dealt; for the latter may prove merely the agent of an undisclosed principal. This possibility may, of course, be forestalled by so terming the contract as to exclude parties other than the one in whose name it is made, as where the latter specifies that he, personally, is the owner of property that forms the subject matter of the agreement.¹⁰ So, the nature of an obligation may be

⁷ *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Ames v. Railway Co.*, 12 Minn. 413; *Foster v. Graham*, 166 Mass. 202, 44 N. E. 129; *Elkins v. Railway Co.*, 19 N. H. 337, 51 Am. Dec. 184; *Great Lake Towing Co. v. Mills Transp. Co.*, 83 C. C. A. 607, 155 Fed. 11; *Noel Const. Co. v. Atlas Portland Cement Co.*, 103 Md. 209, 63 Atl. 384.

⁸ *Dubois v. Perkin*, 21 Ore. 189, 27 Pac. 1044; *Pitts v. Mower*, 18 Me. 361, 36 Am. Dec. 727.

⁹ *Colburn v. Phillips*, 13 Gray (Mass.) 64; *Alsop v. Caines*, 10 Johns. (N. Y.) 396; *Sadler v. Leigh*, 4 Camp. (Eng.) 195.

¹⁰ *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93. See *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13; *Boston Ice Co. v.*

such as to imply personal performance, as in the case of contracts for services, where the character or skill of the person dealt with is an essential element of the agreement.¹¹ Thus, where a particular lawyer is retained to try a case, some other lawyer—though he might be a better one—could not assert a right to perform the service, on the ground that he was the undisclosed principal of the man employed.¹² He might, however, recover a fee due the agent for performance, by the latter, of the services.¹³

§ 126. Defenses. (a) In general. Before disclosure of a principal, or notice, actual or constructive, of a principal's existence, a third person is clearly justified in dealing upon the assumption that the agent is the real and only party to the transaction; and his rights will be protected accordingly.¹⁴ Payment to the agent before notice of existence of an undisclosed principal, discharges the third

Potter, 123 Mass. 28, 25 Am. Rep. 9; *Moore v. Vulcanite Cement Co.*, 106 N. Y. Supp. 393. Where exclusive credit is given the agent in his own name, an undisclosed principal can not sue on the contract. *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322.

¹¹ *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Kelly v. Thuey*, 102 Mo. 522, 15 S. W. 62; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 301. So, generally where the agreement involves elements of personal trust and confidence in the person acting as ostensible principal. *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 44 South. 642.

¹² *Eggleston v. Boardman*, 37 Mich. 14.

¹³ *Warder v. White*, 14 Ill. App. 50; *Sullivan v. Shailor*, 70 Conn. 733, 40 Atl. 1054.

¹⁴ *Shine v. Kinealy*, 102 Ill. App. 473. Where a person deals with another, believing him to be the principal, an undisclosed principal, if he seeks to enforce the contract, must take it as the agent and the other party made it;—must suffer its burdens, and take payments as the agent agreed to take them. *Hook v. Crowe*, 100 Me. 399, 61 Atl. 1080.

person from further liability.¹⁵ So, the third party may set off a debt due him from the agent, though the same arose after the transaction, but before notice of the agency.¹⁶ And, generally, any defense that would have been good against the agent will be available against the undisclosed principal, provided the same arose before notice of the principal's existence.¹⁷ Where the third person knows, or has reason to believe, that he is dealing with an agent, he will not be protected because the identity of the principal was unknown.¹⁸

(b) **Estoppel.** The rules laid down in the preceding subdivision are simply an application of the equitable doctrine of estoppel. Where a principal authorizes his agent to act as ostensible principal, he will not be permitted to assert the agency to the disadvantage of one who relied in good faith upon what appeared to be a different state of facts.¹⁹ And though the agent violated instructions, and acted wrongfully, in not disclosing the fact that he was merely an agent, the principal may still be estopped to assert his rights, where he clearly put it within the power of the agent to deceive third persons. Thus, it is generally held in cases where an agent to sell is intrusted with pos-

¹⁵ *Dubois v. Perkins*, 21 Ore. 189, 27 Pac. 1044; *Rice & Bullen Malting Co. v. Bank*, 185 Ill. 422, 56 N. E. 1063.

¹⁶ *Gardner v. Allen*, 6 Ala. 187, 41 Am. Dec. 45; *Frame v. Coal Co.*, 97 Pa. 309; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211.

¹⁷ Though an undisclosed principal may sue on a contract made with his agent, yet the other party will be entitled to set off any claim he may have against the agent. *Durant Lumber Co. v. Sinclair Lumber Co.*, 2 Ga. App. 209, 58 S. E. 485.

¹⁸ *Ilsley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; *Traub v. Milliken*, 57 Me. 67, 2 Am. Rep. 14; *Rosser v. Darden*, 82 Ga. 219, 7 S. E. 919.

¹⁹ *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211.

²⁰ *Belfield v. Supply Co.*, 189 Pa. St. 189, 42 Atl. 131.

session of the goods, and sells the same without disclosing the agency, that defenses good against the agent may be set up against the principal.²⁰ Where the defense consists merely of payment to the agent, it could also be predicated upon the ground that an agent to sell, when intrusted with possession, has implied, or apparent, authority to receive payments.²¹

But where an agent, not intrusted with possession, nor otherwise held out as owner of goods, which he is authorized to sell, makes a sale without disclosing the agency, the principal would not be bound by payment to the agent, nor could the buyer set off a debt due him from the agent.²² So, even though the agent is intrusted with possession, or otherwise held out as apparent owner, a third person dealing with him can not ignore facts which would put a reasonably prudent man on inquiry; and if he does ignore such facts and neglects to make such inquiry he is charged with constructive notice of the agency.²³

§ 127. Money paid through mistake. Where money is paid, or property transferred, by an agent to a third party

²¹ Ante § 96.

²² *McLachlin v. Brett*, 105 N. Y. 391, 12 N. E. 17. "The fact that the agent had not possession of the property he was selling was sufficient to require of defendant that, before payment, he should ascertain to whom payment was due." *Crosby v. Hill*, 39 Ohio St. 100.

²³ *Miller v. Lea*, 35 Md. 396, 6 Am. Dec. 417; *Baxter v. Sherman*, 73 Minn. 436, 76 N. W. 211; *Hook v. Crowe*, 100 Me. 399, 61 Atl. 1080. Thus, where a cotton broker, intrusted with possession, sold in his own name, but the buyer knew that he sometimes sold in his own name when merely acting as broker, and in this case the buyer had no belief either way, he was not permitted to set off against the principal a debt due from the broker. *Cook v. Eshelby*, 12 App. Cas. (Eng.) 271.

through mistake, or under other circumstances which would justify recovery had the principal himself paid the money or made the transfer, the third party will be liable to the principal for the return of such money or other property.²⁴ So, money illegally exacted from an agent, or lost by him in gambling, may be recovered by the principal.²⁵

§ 128. **Property wrongfully transferred.** (a) In general. Where an agent without authority, transfers the property of his principal to a third person, no title passes; and the principal may recover such property from any one holding the same.²⁶ Thus, where an agent having possession of property of his principal, but not for purpose of sale, fraudulently sells the same even to an innocent person, such person no more acquires title than he would have if he had purchased from a thief; and the owner may recover the property from him.²⁷

As we saw in an earlier chapter, the conduct of the principal may have been such as to estop him to deny want of authority in the agent to sell.²⁸ Ordinarily, mere possession of goods does not imply authority to sell them, but under certain circumstances, intrusting an agent with possession may be sufficient to estop the principal either from denying that the agent was empowered to sell, or from de-

²⁴ *United States v. Bartlett*, 2 Ware. (U. S.) 17.

²⁵ *Holman v. Frost*, 26 S. C. 290; *Mason v. Waite*, 17 Mass. 560; *Burnham v. Fisher*, 25 Vt. 514.

²⁶ *Levi v. Booth*, 58 Md. 308, 42 Am. Rep. 332; *Manning v. Keenan*, 73 N. Y. 45; *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 56 N. W. 663.

²⁷ *Thompson v. Barnum*, 49 Iowa, 392; *Bertholf v. Quinlan*, 68 Ill. 297; *Grubel v. Busche*, 75 Kan. 820, 91 Pac. 73.

²⁸ Ante § 51.

nying ownership in the agent.²⁹ "Two things," said the court in a New York case, "must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent: 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of, it; and 2. The person alleging the estoppel must have acted and parted with value, upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real."³⁰ Thus, if a man voluntarily places his property in the hands of another whose business it is to sell such property as agent for others, in the absence of circumstances indicating a contrary intention, the inference arises that such agent has authority to sell the property, and innocent third persons may safely act upon such inference.³¹ As was said in an English case: "If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one sends goods to an auction room, can it be supposed that he sent them thither merely for safe keeping?"³²

Mere possession will not imply authority to sell unless it is inconsistent with any other inference;³³ and unless

²⁹ Ante § 96.

³⁰ *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; s. c., 58 N. Y. 73, 17 Am. Rep. 208.

³¹ *Smith v. Clews*, 105 N. Y. 283, 59 Am. Rep. 502, 11 N. E. 632; *Heath v. Stoddard*, 91 Me. 499, 40 Atl. 547; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195. It is not enough to create an estoppel that the person intrusted with possession is a dealer in that class of goods. *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332.

³² *Pickering v. Busk*, 15 East. 38.

³³ *Covill v. Hill*, 4 Denio (N. Y.), 323; *McNeill v. Tenth Nat Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

possession is acquired with the owner's consent.³⁴ "If it were otherwise," to quote an English judge, "people would not be secure in sending their watches or articles of jewelry to a jewelry establishment to be repaired, or cloth to a clothing establishment to be made into garments."³⁵ Neither would it be safe to intrust goods to an agent for storage or transportation; and a person could be divested of title by an agent wrongfully securing possession of goods and selling them to another. But in none of these cases could the agent pass title.³⁶

(b) *Indicia of ownership.* Where, however, the owner of property not only intrusts the agent with possession, but also invests him with written evidence or indicia of ownership, he will be estopped, as against an innocent purchaser, to deny the agent's title.³⁷ Thus, where the owner of bank shares delivered the same to a broker, indorsed with an assignment and a power of transfer signed and sealed by himself, and the broker wrongfully disposed of the same for his own benefit, the principal was held estopped to assert his title against a *bona fide* holder.³⁸ So, where an agent purchased a horse for his principal, but took the bill of sale in his own name, and the principal, with knowledge of that fact, allowed the agent, in order to train it, to keep possession of the horse and also of the bill of sale, he was estopped to set up his title against an innocent person to

³⁴ *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

³⁵ *Wilkinson v. King*, 2 Camp. 335.

³⁶ *McMahon v. Sloan*, 12 Pa. St. 229, 51 Am. Dec. 602; *Gussner v. Hawks* (N. D.), 101 N. W. 898.

³⁷ *Nixon v. Brown*, 57 N. H. 34; *Walker v. Railway Co.*, 47 Mich. 338, 11 N. W. 187; *Moore v. Metropolitan Bank*, 55 N. Y. 41, 14 Am. Rep. 173.

³⁸ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

whom the agent, in fraud of his principal, subsequently sold the horse.³⁹ And, generally, any conduct of an owner of property which unequivocally creates appearance of ownership in another may be shown for the purpose of estopping such owner to set up title in himself.⁴⁰

(c) **Money and negotiable instruments.** The rules discussed in the two preceding subdivisions have, in the main, no application to the transfer of money, or of negotiable instruments payable to bearer or indorsed in blank. It is the policy of the law, induced by business necessity, to permit money, and such negotiable paper as is transferable by delivery, to pass freely from hand to hand unaffected by limitations not appearing on its face. Where a person finds, or even steals, either money or negotiable paper payable to bearer or indorsed in blank, and pays out such money, or delivers, before maturity, such negotiable paper to an innocent person for value, the transferee acquires title good against even the original owner.⁴¹ It follows, of course, that where an agent acquires, either rightly or tortiously, possession of money or negotiable paper of the character described, belonging to his principal, he can, under like conditions, vest good title in an innocent transferee.⁴²

³⁹ *Nixon v. Brown*, 57 N. H. 34.

⁴⁰ *Calais Steamboat Co. v. Van Pelt*, 2 Black. (U. S.) 372; *Bartlett v. Board*, 59 Ill. 371. In order to estop the true owner, the purchaser must have parted with value, in good faith, and in reliance upon the appearance of ownership or authority in the agent. *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; s. c., on motion for rehearing. 58 N. Y. 73, 17 Am. Rep. 208.

⁴¹ *Tiedeman on Bills and Notes*, § 93. After maturity a bill or note loses its peculiar character of a negotiable instrument.

⁴² *Burnham v. Holt*, 14 N. H. 367; *Smith v. Farmers', etc., Bank*, 2 Cal. App. 377, 84 Pac. 348. If the paper were payable to the principal, but not indorsed, its possession would be no evidence of

§ 129. **Following trust funds.** Where an agent wrongfully converts property of his principal into some other form, as where he purchases property with funds belonging to his principal, he will be deemed to hold the same as trustee for the principal, whose equitable right in all proceeds of such wrongful transaction attaches, no matter through how many transmutations of form the property may have passed.⁴³ Where, however, an agent wrongfully using his principal's funds, purchases property and then transfers the same for value to an innocent purchaser, the trust in favor of the principal can not be enforced against such *bona fide* holder.⁴⁴ The principal's right or title in the property is merely equitable and can not defeat a legal title acquired for value and without notice.⁴⁵

§ 130. **Fraud. (a) In general.** Where a third person in dealing with an agent is guilty of fraud, as where he induces the making of a contract by false representations, his liability to the principal is the same as it would have been had the principal dealt in person.⁴⁶ So, where a public officer made a false record, and a person suffered loss by

title in the agent. *Gibson v. Miller*, 29 Mich. 355; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18, 97 Am. Dec. 70.

⁴³ *Farmers' & Mechanics' Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215; *Central National Bank v. Insurance Co.*, 104 U. S. 54; *Third Nat. Bank v. Gas Co.*, 36 Minn. 75, 30 N. W. 440; *Baker v. New York Nat. Bank*, 100 N. Y. 31, 53 Am. Rep. 150. 2 NE 452.

⁴⁴ *Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595, 40 Am. Rep. 218; *Roca v. Byrne*, 145 N. Y. 182, 39 N. E. 812. "The principal may reclaim property from a mere volunteer or purchaser with notice. *Riehl v. Association*, 104 Ind. 70, 3 N. E. 633; *Smith v. Bank*, 2 Cal. App. 377, 84 Pac. 348.

⁴⁵ *Pomeroy on Equity*, § 591; *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357, 81 N. W. 20.

⁴⁶ *Tuckwell v. Lambert*, 5 Cush. (Mass.) 23.

reason of the fact that his agent, engaged in his business, was deceived by such record, the officer was held liable to the principal.⁴⁷

(b) **Collusion with agent.** An agent is required to exercise in the performance of his duties the highest good faith, and can not be permitted, without the principal's full knowledge and consent, to represent the other party in a transaction.⁴⁸ If, therefore, such other party colludes with the agent, or seeks in any way to influence his action adversely to the principal's interest, as by giving him a gratuity, such conduct constitutes a fraud upon the principal, who may rescind the contract upon that ground;⁴⁹ or maintain an action against both agent and third person for the wrong.⁵⁰

§ 131. **Causing loss of service.** Where a person maliciously induces an agent to break a contract of employment and abandon his agency, it is usually held that such person would be liable in damages to the principal.⁵¹ So, an action may be maintained against a third person for personal injury committed by him upon an agent which prevented the latter from performing some stipulated serv-

⁴⁷ *Perkins v. Evans*, 61 Iowa, 35, 15 N. W. 584.

⁴⁸ Ante § 25; Post § 150.

⁴⁹ *United States Rolling Stock Co. v. Atlantic, etc., Ry. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380; *Findlay v. Pertz*, 13 C. C. A. 559, 66 Fed. 427; *New York Central Ins. Co. v. National Ins. Co.*, 14 N. Y. 85; *Bollman v. Loomis*, 41 Conn. 581.

⁵⁰ *Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210.

⁵¹ *Angle v. Railway Co.*, 151 U. S. 1; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780. See *Bourlier v. Macauley*, 91 Ky. 135, 15 S. W. 60, where the rule is practically limited to domestic relations.

ice.⁵² And it has been held that a railway company may recover damages against a person who maliciously causes the arrest of its engineer, while running a train; where the arrest was made with intent to delay the train and thus injure the company.⁵³

⁵² *Ames v. Union Railway Co.*, 117 Mass. 541, 19 Am. Rep. 426; *Fluker v. Railway Co.*, 81 Ga. 461, 8 S. E. 529.

⁵³ *St. Johnsbury, etc., Ry. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

PART IV.

RIGHTS AND LIABILITIES BETWEEN AGENT AND THIRD PARTY.

CHAPTER XIII.

✓ LIABILITY OF AGENT TO THIRD PERSON—LIABILITY OF THIRD PERSON TO AGENT.

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I. Liability of Agent to Third Pers

§ 132. **In general.** Where an agent, acting within the scope of his authority, real or apparent, properly executes a contract in behalf of his principal, the latter alone is liable thereon; and no rights or obligations arise between the agent and the third party.¹ So, where a principal ratifies a contract, made in his behalf without authority, the ratification is equivalent to precedent authorization, and the principal alone becomes liable on the contract.² It follows, therefore, that personal liability of an agent to the third person arises only in those cases where the agent acts beyond the scope of his authority, or, acting within the scope of his authority, contracts in his own name instead of in the name of his principal. In all cases, of course, where the agent is guilty of tort, in violation of the rights of third persons, he will be personally liable in damages, notwithstanding that in committing the wrongful act, he was acting in obedience to his principal's instructions.³

§ 133. **Simple contracts.** (a) **In general.** Where an agent executes a contract in his own name, he clearly is a

¹ *Lamson & Goodnow Mfg. Co. v. Russell*, 112 Mass. 387. One who signs a contract as agent for a party thereto is not bound by the contract, and the effect is the same, so far as an action based thereon against the agent is concerned, as if the party himself had signed his name to the contract. *Largey v. Leggat*, 30 Mont. 148, 75 Pac. 950.

² *Ante*, Chap. V.

³ *Post* § 140.

party thereto and hence is liable thereon; notwithstanding that he executed the same in behalf of a principal.⁴ If the contract be a simple non-negotiable one, executed within the scope of the agent's authority, the third party, as we have seen, may, at his option, ignore the agent and elect to hold the undisclosed principal.⁵ This right, however, is personal, and the agent can not force him to such election. In short, if the agent appears as the party to the contract he is liable thereon, and can not escape liability by showing the existence of an undisclosed principal. Hence in a suit on such a contract against the agent, extrinsic evidence is inadmissible to show that he acted in a representative character.⁶ Such evidence, clearly, would be immaterial; for proof of existence of an undisclosed principal would not defeat the agent's personal liability where the third party elects to enforce it. Resort to an undisclosed principal is at the option of the third party.⁷

(b) **Construction.** An agent, therefore, can escape being held liable on a contract, at the option of the third party, only by showing that the contract was made in the

⁴ *Baldwin v. Leonard*, 39 Vt. 260, 94 Am. Dec. 324; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Baltzen v. Nicolay*, 53 N. Y. 470; *Bartlett v. Raymond*, 139 Mass. 275.

⁵ Ante § 109 (b). Where suit is started against the agent, but the principal subsequently is discovered and made a party, and a case is established against both, the plaintiff must elect against which of the two he will ask judgment. *Pittsburg Plate Glass Co. v. Roquemore* (Tex. Civ. App.), 88 S. W. 449.

⁶ *Bryan v. Brazil*, 52 Iowa, 350; *Higgins v. Senior*, 8 M. & W. (Eng.) 834; *Mechem on Agency*, § 449. When an invoice is only evidence of a contract, and not the contract, parol evidence is admissible to show that a person whose name appears as seller is not a party. *Holding v. Elliott*, 5 H. & N. (Eng.) 117.

⁷ Ante § 109 (b).

name of a principal. Where the contract was oral, any evidence would be admissible that would tend to show that the third party knew that he was dealing with the agent in a representative character; and if that fact could be established, the agent would be relieved of liability.⁸ Where the contract is written, the question as to whether the agent is bound would be determined from a construction of the written instrument.

In construing a simple non-negotiable contract for the purpose of determining whether an agent should be bound thereby, more liberal rules of construction prevail than in the case of sealed instruments or negotiable paper.⁹ Thus, where the writing states that the contract is "on account of," or "in behalf of," a principal named, the agent probably would not be bound, though his signature be unqualified.¹⁰ And, so, where he describes himself as "agent," "trustee" or the like, parol evidence is usually admitted to clear up the ambiguity thus created, and to show that

⁸ *Steamship Bulgarian Co. v. Transportation Co.*, 135 Mass. 421; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Anderson v. Timberlake*, 114 Ala. 377, 22 South. 431. An agent is not liable on a contract for his principal where the other party enters into the same intending to hold the principal. *Meade Plumbing Co. v. Irwin*, 77 Neb. 358, 109 N. W. 391.

⁹ *Whitney v. Wyman*, 101 U. S. 392; *Goodenough v. Thayer*, 132 Mass. 152; *Wheeler v. Walden*, 17 Neb. 122, 22 N. W. 346. Although an agent executes an instrument in his own name he will not be personally bound unless the language shows a clear intent to that effect. *Frambach v. Frank*, 33 Colo. 529, 81 Pac. 247.

¹⁰ *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Rogers v. March*, 33 Me. 106; *Smith v. Alexander*, 31 Mo. 193; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680; *Post v. Pearson*, 108 U. S. 418.

the agent contracted in his representative character.¹¹ Other cases apply the rule more strictly, and hold that even in non-negotiable simple contracts, if the agent engages expressly in his own name to perform obligations, he is responsible, notwithstanding that he describes himself as agent.¹²

This question of the construction of a simple non-negotiable contract for the purpose of determining whether the agent is a party thereto, arises, it must be remembered, only in cases where the agent seeks to escape personal liability. Where an undisclosed principal seeks to enforce such a contract; or where the third party elects to hold the principal; extrinsic evidence may always be introduced to show that the agent contracted in behalf of an undisclosed principal, notwithstanding that on its face the contract is in the name of the agent and that there is no indication that he acted in a representative capacity.¹³

§ 134. Sealed instruments. Where an agent executes a sealed instrument in behalf of his principal, the latter, as we have seen, will not be bound by the same unless he appears upon the face thereof as the party thereto.¹⁴ The question whether the agent is personally bound must likewise be determined from a construction of the instrument. Without again going over the cases, which are discussed

¹¹Deering v. Thom, 29 Minn. 120, 12 N. W. 350; Peterson v. Homan, 44 Minn. 166, 46 N. W. 303; Rhone v. Powell, 20 Colo. 41, 36 Pac. 899.

¹²Matthews v. Jenkins, 80 Va. 463; Brown v. Bradlee, 156 Mass. 28, 30 N. E. 85; Simonds v. Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41. See McDonald v. Bond, 195 Ill. 122, 62 N. E. 881; Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123.

¹³Ante § 109 (a).

¹⁴Ante § 107.

in the chapter relating to the principal's liability,¹⁵ it may be stated in general terms, that an agent can not escape personal liability under a sealed instrument executed, upon its face, in his name merely because he is described therein as agent of another.¹⁶ Nor will he be relieved from liability merely because the instrument recites that he acts as agent for another in pursuance of authority given, or in behalf of a principal named.¹⁷ Sealed instruments, as we have seen, are strictly and technically construed.¹⁸ It may, of course, happen that an instrument will be so executed as to be binding upon neither principal nor agent, as where the principal is named as the party, and the instrument is signed and executed by the agent individually.¹⁹

§ 135. Negotiable instruments. An agent is personally liable upon a negotiable instrument, though executed in behalf of a principal, where it appears upon the face of the same that the agent is the party thereto.²⁰ The instrument is still deemed his, notwithstanding that he describes himself as agent of another, or recites that he executes the same in behalf of a principal.²¹ As we saw in considering the

¹⁵ Ante, Chap. X.

¹⁶ *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; *Fulham v. West Brookfield*, 9 Allen (Mass.), 1; *Dayton v. Warne*, 43 N. J. Law, 659.

¹⁷ *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126.

¹⁸ Ante § 107.

¹⁹ *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131; *Neufeld v. Beldler*, 37 Ill. App. 34.

²⁰ *Dewitt v. Walton*, 9 N. Y. 570; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Sparks v. Transfer Co.*, 104 Mo. 531, 15 S. W. 417.

²¹ *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320; *Fiske v. Eldridge*, 12 Gray (Mass.), 474; *Ohio Nat. Bank v. Cook*, 38 Ohio St.

principal's liability, the courts tend to greater liberality in the construction of negotiable instruments, than in construing sealed instruments, for the purpose of determining who is the real party thereto.²² So, in many states, where there is some indication upon the face of the instrument that the agent acted in his representative character, extrinsic evidence may be introduced to show who was intended to be bound.²³ Even under this rule, however, merely adding the designation "agent," without naming the principal, would not relieve the agent from liability to a purchaser who had no other notice of the representative character of the signer.²⁴ It is usually held that the cashier of a bank will not be personally liable on paper duly signed by him as "cashier," but the same may be shown to be the obligation of the bank.²⁵ The rule is frequently extended to prudential officers of other corporations.²⁶

§ 136. **Public officers.** The rules governing the liability of an agent, upon contracts executed in his own name, do not apply to contracts executed by public officers. It is generally held that a public officer will never be liable on a contract made in behalf of the government,²⁷ unless he

442; *Coburn v. Lodge*, 71 Iowa, 581, 32 N. W. 513; *Robinson v. Bank*, 44 Ohio St. 441, 8 N. E. 583.

²² Ante § 108 (a).

²³ Ante § 108 (b).

²⁴ *Metcalf v. Williams*, 104 U. S. 93.

²⁵ *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *Bank of Manchester v. Slason*, 13 Vt. 334; *Dutch v. Boyd*, 81 Ind. 146; *Houghton v. Bank*, 26 Wis. 663, 7 Am. Rep. 107.

²⁶ *Babcock v. Beman*, 11 N. Y. 200; *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71.

²⁷ *Parks v. Ross*, 11 How. (U. S.) 362; *Freeman v. Otis*, 9 Mass.

expressly pledges his personal credit.²⁸ This exemption, however, is not always extended to officers of public corporations.²⁹

§ 137. **Acting without authority. (a) In general.** Where an agent without authority executes a contract in the name of a principal, the latter, of course, is not obligated thereby. Neither is the agent personally bound where he does not appear as a party to the contract.³⁰ Independently of the contract, however, the agent becomes liable to the third person, either upon the theory of deceit, in falsely representing himself to have authority;³¹ or upon the theory of breach of an implied warranty that he possesses the authority which he assumed to exercise.³²

(b) **Deceit.** Where a person fraudulently represents that he is the agent of another, and as such makes a contract in the name of his supposed principal, he is clearly guilty

272, 6 Am. Dec. 66; *Sparta School Tp. v. Mendall*, 138 Ind. 188, 37 N. E. 604.

²⁸ Mechem on Public Officers, Chap. VII.

²⁹ *Brown v. Bradlee*, 156 Mass. 28, 30 N. E. 85; *City of Providence v. Miller*, 11 R. I. 272, 23 Am. Rep. 453; Mechem on Public Officers, Chap. VII.

³⁰ *Johnson v. Smith*, 21 Conn. 627; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506; *Noyes v. Loring*, 55 Me. 408; *Senter v. Monroe*, 77 Cal. 347, 19 Pac. 580; *Cole v. O'Brien*, 34 Neb. 68, 51 N. W. 316; *White v. Madison*, 26 N. Y. 117. Some courts have manifested a tendency to disregard the reference to the principal and to hold the agent personally. *Roberts v. Button*, 14 Vt. 195; *Weare v. Gove*, 44 N. H. 196. See *Terwillinger v. Murphy*, 104 Ind. 32, 3 N. W. 404; *Solomon v. Penoyar*, 89 Mich. 11, 50 N. W. 644. This, however, is to make a contract for the parties rather than to construe one which they have made. *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64.

³¹ Post, § 137 (b).

³² Post, § 137 (c).

of a tort, in the nature of deceit, and will be liable in damages to the third person with whom he deals.³³ Nor is it necessary to create liability that the agent expressly represent that he possesses competent authority; for if he deals with a third person as one possessing such authority, and fails to disclose his lack of it, he will be liable to the third party for any injury occasioned.³⁴

(c) **Breach of warranty.** Where the agent acts in good faith, under a mistaken belief that he possesses the authority which he assumes to exercise, the element of fraud is eliminated, and an action sounding in tort could not be maintained against him. The third party, however, would still have a right of action against the agent upon the theory that when a person undertakes to act as agent for another he warrants possession of the authority which he assumes to exercise, and in the event of exceeding such authority is liable in damages for breach of this implied warranty.³⁵ Liability, however, would not arise where the circumstances were such as to negative existence of such a warranty. Thus, if an agent, in good faith, discloses all the facts upon which is based his assumption of authority, no warranty would be implied.³⁶ So, it has been held that

³³ *Noyes v. Loring*, 55 Me. 408; *Ballou v. Talbot*, 16 Mass. 461, 3 Am. Dec. 146; *Duncan v. Niles*, 32 Ill. 532; *Dung v. Parker*, 52 N. Y. 494.

³⁴ *Kroeger v. Pitcalrn*, 101 Pa. St. 311, 47 Am. Rep. 718; *White v. Madison*, 26 N. Y. 117; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

³⁵ *Baltzen v. Nicolay*, 53 N. Y. 467; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506; *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246; *Lane v. Carr*, 156 Pa. St. 250, 25 Atl. 830; *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340; *Anderson v. Adams*, 43 Ore. 621, 74 Pac. 215.

³⁶ *Hall v. Lauderdale*, 46 N. Y. 72; *Ware v. Morgan*, 67 Ala. 461; *Newman v. Sylvester*, 42 Ind. 106; *Michael v. Jones*, 84 Mo. 578.

the agent would not be liable for breach of warranty where, unknown to him, the principal was dead at the time the contract was entered into.³⁷

(d) **Damages.** In case of false representation of authority, or breach of warranty as to its possession, the third person may recover damages for loss approximately resulting therefrom.³⁸ In the case of contracts, the usual measure would be the damages which could have been recovered against the principal for breach of the contract, had it been authorized.³⁹ It follows that if the contract would not have been enforceable against the principal, even had it been authorized, as where requisite legal formalities had not been observed, no recovery can be had against the agent.⁴⁰

§ 138. **Liability for money received. (a) In good faith.** Where money has been received by an agent, in good faith, from a third person, but under circumstances—such as a mistake of fact—that would have entitled the other person to reclaim the same had it been paid to the principal directly, the agent will be liable for return of the money.⁴¹

³⁷ *Smout v. Ilbery*, 10 M. & W. (Eng.) 1. If the defect of authority arises from a want of legal capacity, and if the parties are under a mutual mistake of the law, and are both equally informed in regard to the facts, there would be no remedy against the agent. *Jefts v. York*, 10 Cush. (Mass.) 392.

³⁸ *Skaaraas v. Finnegan*, 32 Minn. 107, 19 N. W. 729; *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110.

³⁹ *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640; *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340.

⁴⁰ *Baltzen v. Nicolay*, 53 N. Y. 467; *Kent v. Addicks*, 60 C. C. A. 660, 126 Fed. 112. Where a contract made by an agent in the name of a principal, without authority, is void under the statute of frauds, the agent is not liable. *Morrison v. Hazzard* (Tex. Civ. App.), 88 S. W. 385.

⁴¹ *Mowatt v. McLelan*, 1 Wend. (N. Y.) 173; *O'Connor v. Clap-*

But this liability ceases if the agent, before notice of the other party's claim, has paid the money over to his principal.⁴² Where the agent had not disclosed his agency, but the other party dealt with him as a principal, payment over to the real principal has been held no defense.⁴³

(b) **Wrongfully.** Where an agent acquires money tortiously, as by illegal exaction or fraud, he is guilty of a personal wrong and will be liable in an action for recovery of the money, notwithstanding that he may have paid the same over to his principal.⁴⁴

§ 139. **Money received from principal.** Where a principal delivers money to an agent, to be by him paid over to a third person, the agent's duty of performance is to the principal alone, and there is no privity of contract between him and the third person; and until performance, the principal may revoke the authority and reclaim the money.⁴⁵ But once the agent promises the third person to pay the money to him, or in any way indicates assent to an appropriation of the funds to the latter's use, the principal's right to revoke the authority ceases, privity of contract

ton, 60 Miss. 349; *Smith v. Binder*, 75 Ill. 492. If the third person elects to hold the agent he waives his right against the principal, and *vice versa*. See *Eufaula Grocery Co. v. Bank*, 118 Ala. 408, 24 South. 389.

⁴² *Cabot v. Shaw*, 148 Mass. 459, 20 N. E. 99; *Shepard v. Sherin*, 43 Minn. 382, 45 N. W. 718.

⁴³ *Smith v. Kelly*, 43 Mich. 390, 5 N. W. 437.

⁴⁴ *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Ripley v. Gelston*, 9 Johns. (N. Y.) 201; *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89; *Hardy v. Express Co.*, 182 Mass. 328, 65 N. E. 375.

⁴⁵ *Tiernan v. Jackson*, 5 Pet. (U. S.) 580; *Seaman v. Whitney*, 24 Wend. (N. Y.) 260, 35 Am. Dec. 618; *Williams v. Everett*, 14 East. (Eng.) 582.

arises between the third person and the agent, and the latter is liable for payment of the money.⁴⁶

§ 140. **Liability for torts.** (a) **In general.** An agent in the performance of his duties is bound to respect the rights of third persons, and can not escape liability for violation of those rights by setting up the fact that his wrongful acts were done in behalf of his principal.⁴⁷ "No man," said the court in a Louisiana case, "increases or diminishes his obligations to strangers by becoming an agent."⁴⁸ Thus, an agent who, for his principal, wrongfully takes or detains property is liable in tort, notwithstanding that he acted in good faith, supposing the goods to belong to his principal.⁴⁹ So, an agent is liable for trespass, though committed by him under direction of his principal.⁵⁰ Since the element of intent is essential to fraud, an agent who acted in good faith would not be personally liable in an action for deceit.⁵¹

⁴⁶ *Wyman v. Smith*, 2 Sandf. (N. Y.) 331; *Goodwin v. Bowden*, 54 Me. 424.

⁴⁷ *Bennett v. Ives*, 30 Conn. 329; *Burnap v. Marsh*, 13 Ill. 535; *Blue v. Briggs*, 12 Ind. App. 105, 39 N. E. 885.

⁴⁸ *Delany v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456.

⁴⁹ *Cranch v. White*, 1 Bing. (N. C.) 414; *McPheters v. Page*, 83 Me. 234, 22 Atl. 101; *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419. But see *Leuthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503; *Abernathy v. Wheeler*, 92 Ky. 320, 17 S. W. 858.

⁵⁰ *Mill v. Hawker L. R.*, 10 Ex. (Eng.) 92.

⁵¹ *Hedden v. Briffin*, 136 Mass. 229, 49 Am. Rep. 25; *Weber v. Weber*, 47 Mich. 569, 11 N. W. 389; *Hedin v. Institution*, 62 Minn. 146, 64 N. W. 158. Where the tort is committed within the scope of the agent's authority, or is ratified, the principal, of course, is also liable. Ante § 119.

(b) **Nonfeasance.** It is stated as the rule that an agent is not liable to third persons for nonfeasance—mere failure to act.⁵² This rule is but a further application of the doctrine that a man neither increases nor diminishes his obligations to strangers by becoming an agent. Where a person is employed to perform service for another he owes no duty to strangers to enter upon performance, and hence is not liable to them for failure to do so. His obligation, which is contractual, is solely to his principal.⁵³ Thus, where an agent, in charge of a plantation, neglected to keep open a drain, it was held that his duty to do so was solely to the principal, and that he was not liable for damages resulting to an adjoining owner.⁵⁴ So, where an agent, who had let a house for his principal, authorized the tenant to erect a cooking range upon the premises, he was held not liable for damages to a neighboring proprietor caused by use of the range.⁵⁵ And an agent charged with the duty of keeping a house in repair is not liable to a third person for injury caused by his failure to perform this duty.⁵⁶

Where, however, the agent enters upon performance of the service, he assumes a duty to the public to exercise due care, and becomes liable for acts either of omission or com-

⁵² Story on Agency, § 308.

⁵³ *Denny v. Manhattan Co.*, 2 Denio (N. Y.), 115; *Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735; *Feltus v. Swan*, 62 Miss. 415, *Delany v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456.

⁵⁴ *Feltus v. Swan*, *supra*.

⁵⁵ *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278.

⁵⁶ *Delany v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829; *Murray v. Usher*, 117 N. Y. 542, 23 N. E. 564. "An agent charged with superintendence of the erection of a grandstand has been held not liable to third persons for negligently permitting the erection of a defective structure. *Van Antwerp v. Linton*, 89 Hun (N. Y.), 417, affirmed, 157 N. Y. 716, 53 N. E. 1133.

mission.⁵⁷ Thus, where an agent, having charge of a tenement, directed the city water to be turned on, but neglected to see that the pipes were in proper condition, and, in consequence, the water overflowed to the injury of one of the tenants, the agent was held personally liable.⁵⁸ Said the court in a Massachusetts case: "If the agent once actually undertakes, and enters upon, the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons. The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from responsibility for it, as a tort, to third persons injured thereby."⁵⁹ Upon the theory, possibly, that the undertaking has been entered upon, some of the courts incline to hold to personal liability an agent, in charge of a building, who neglects to keep the same in repair.⁶⁰

⁵⁷ *Bell v. Josselyn*, 3 Gray (Mass.), 309, 63 Am. Dec. 741; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Lattman v. Barrett*, 62 Mo. 159. Misfeasance is the improper doing of an act which the agent might lawfully do, and where an agent fails to use reasonable care in the performance of his duty he is personally responsible to a third person injured thereby. *Southern Ry. Co. v. Rowe*, 2 Ga. App. 557, 59 S. E. 462.

⁵⁸ *Bell v. Josselyn*, 3 Gray (Mass.), 309, 63 Am. Dec. 741. Where an agent, having complete control of a tenement house, constructs a walk, but leaves a hole in the same, into which a person, without fault, falls, the agent is guilty of a misfeasance, and is liable. *Carson v. Quinn*, 127 Mo. App. 525, 105 S. W. 1088.

⁵⁹ *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

⁶⁰ *Mayer v. Building Co.*, 104 Ala. 611, 16 South. 620; *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113; *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384. The agent of a non-resident owner of a building, in complete charge thereof, has been held liable for injuries resulting from his negligent failure to repair an unsafe veranda railing. *Lough v. John Davis & Co.*, 35 Wash. 449, 77 Pac. 732; *Same*, 30 Wash. 204, 70 Pac. 491.

II. *Liability of Third Person to Agent.*

§ 141. **On contract. (a) In general.** A contract, of whatever character, properly executed in the name of the principal, is, of course, the principal's contract, and the agent acquires no rights thereunder against the third person.⁶¹ Where, however, a sealed or negotiable instrument is construed to be the personal contract of the agent, he alone, as we have seen, is obligated thereby,⁶² and, as a consequence, has the sole right to enforce the same against the other party.⁶³ Where a simple non-negotiable contract is executed in the name of an agent, but in behalf of a principal, the latter, as we have seen, may supersede the agent as a party to the contract and enforce the same against the third person.⁶⁴ But until thus superseded, the agent may enforce the contract.⁶⁵ Thus, an agent who sells goods for an undisclosed principal may recover the price;⁶⁶ and one who sends goods or money of his principal by express, contracting in his own name, may sue for nondelivery or other breach of the contract.⁶⁷

⁶¹ *Lamson & Goodnow Mfg. Co. v. Russell*, 112 Mass. 387; *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359.

⁶² *Ante* §§ 134, 135.

⁶³ *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Taft v. Brewster*, 9 Johns. (N. Y.) 334; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.

⁶⁴ *Ante* § 125 (a).

⁶⁵ *Colburn v. Phillips*, 13 Gray (Mass.), 64; *Alsop v. Caines*, 10 Johns. (N. Y.) 396; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Simons v. Wittman*, 113 Mo. App. 357, 88 S. W. 791.

⁶⁶ *Alsop v. Caines*, 10 Johns. (N. Y.) 396.

⁶⁷ *Blanchard v. Page*, 8 Gray (Mass.), 281; *Finn v. Railroad Corp.*, 112 Mass. 524, 17 Am. Rep. 128; *Snider v. Express Co.*, 77 Mo. 523; *Carter v. Railway Co.*, 111 Ga. 38, 36 S. E. 308.

(b) **Interest in subject matter.** Ordinarily, an agent's right to sue on a simple non-negotiable contract is subordinate to the superior right of the principal.⁶⁸ Where, however, the agent has a vested interest in the subject matter, such as a lien for commissions, his right of action will be protected against the principal.⁶⁹ So, the existence of a special interest or property in goods may create a right of action in the agent against third persons.⁷⁰ Thus, an agent who has a special interest in goods, by reason of advances made for payment of freight, may maintain an action against a carrier for negligently causing their injury.⁷¹

(c) **Measure of damages.** As the agent would hold the amount recovered in trust for his principal, the measure of damages in an action by the agent would be the same as in an action by the principal.⁷²

§ 142. **Defenses.** Where an agent sues on a contract, made in behalf of his principal, the defendant may avail himself of any defense that would be good against the principal,⁷³ for whose benefit, after all, the action is brought; and also of any defense good against the agent, who is the plaintiff of record.⁷⁴

⁶⁸ *Visher v. Yates*, 11 Johns. (N. Y.) 23; *Schaefer v. Henkel*, 75 N. Y. 378; *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835; *Kelly v. Munson*, 7 Mass. 318.

⁶⁹ *Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377.

⁷⁰ *Toland v. Murray*, 18 Johns. (N. Y.) 24; *Groover v. Warfield*, 50 Ga. 644; *Graham v. Duckwall*, 8 Bush. (Ky.) 12; *Minturn v. Main*, 7 N. Y. 220.

⁷¹ *Steamboat Co. v. Atkins*, 22 Pa. St. 522.

⁷² *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Groover v. Warfield*, 50 Ga. 644; *Evitt v. Bancroft*, 22 Ohio St. 172.

⁷³ *Mechem on Agency*, § 762; *Bliss v. Sneath*, 103 Cal. 43, 36 Pac. 1029.

⁷⁴ *Holden v. Railway Co.*, 73 Vt. 317, 50 Atl. 1096.

§ 143. **Professed agent real principal.** Where a person, professing to be agent of a designated principal, makes a contract in the name of the latter, it seems clear that he could not enforce the contract against the other party. Should the other party, however, with knowledge that the professed agent is the real principal, acquiesce in part performance, he probably would be bound by the contract.⁷⁵ So, if a person professes to contract in behalf of an unnamed principal, the other party, since he enters into such a contract, apparently is indifferent as to the identity of the person to whom he is bound, and hence there seems no objection to the agent disclosing himself as principal, and enforcing the contract.⁷⁶ The question, apparently, has not been raised in the American decisions.

§ 144. **Liability for money.** Where an agent pays money to a third person under a mistake of fact, or fraudulent inducement, he may recover the same in an action in his own name.⁷⁷

§ 145. **Liability for torts.** An agent who is in possession of goods, or who has a special property therein, may maintain an action against third persons for violation of his right of property or possession.⁷⁸ So, an action will lie on behalf of an agent against a person who maliciously and without cause induces his principal to discharge him.⁷⁹

⁷⁵ *Rayner v. Grote*, 15 M. & W. (Eng.) 359; *Whiting v. William H. Crawford Co.*, 93 Md. 390, 49 Atl. 615.

⁷⁶ *Schmaltz v. Avery*, 16 Q. B. (Eng.) 655.

⁷⁷ *Kent v. Bornstein*, 12 Allen (Mass.), 342.

⁷⁸ *Story on Agency*, § 416; *Robinson v. Webb*, 11 Bush. (Ky.) 464; *Taylor v. Hayes*, 63 Vt. 475, 21 Atl. 610; *'Mechanics' & Traders' Bank v. Bank*, 60 N. Y. 40; *Beyer v. Bush*, 50 Ala. 19. An agent who sells on commission may recover for libelous statements causing loss of sales. *Weiss v. Whittemore*, 28 Mich. 366.

⁷⁹ *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297.

PART V.

RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

CHAPTER XIV.

OBLIGATION OF AGENT TO PRINCIPAL.

- § 146. In general.
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 - (b) Implied instructions.
- 148. Justification for disobedience.
 - (a) Emergency.
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- 149. Duty to exercise care and diligence.
 - (a) In general.
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- 150. Duty to act in good faith.
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 - (d) May not deny title.
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 - (f) Failure to give notice.
- 151. Duty to account.
 - (a) In general.
 - (b) Duty to pay over.
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- 152. Subagents.

§ 146. **In general.** The duties and obligations of an agent to his principal are contractual in nature and are founded upon the contract of employment between him and the principal. Broadly stated, an agent owes to his principal, by virtue of the relation between them, the duty to obey instructions, to exercise care and diligence, to act in good faith, and to account for the proceeds of his agency.

§ 147. **Duty to obey instructions.** (a) **Express instructions.** Where an agent acts under express instructions, it is his duty to follow the same, and he will be liable for damages resulting from a voluntary deviation, notwithstanding that the contrary course, which he followed, was reasonable, and intended for the principal's benefit.¹ Nor will it be competent to show that such deviation was not material, except for the purpose of proving that it did not contribute to the loss sustained.² Thus, where an agent was directed to remit money by mail in bills of \$50 or \$100, and he remits in bills of smaller denominations, which were not received, the agent was held liable.³ "It is not sufficient," said the court, "that the deviation was not material, if it appears that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. This may be a difficult task in a case like the present, but the defendant voluntarily assumed it when he substituted his own

¹ *Whitney v. Express Co.*, 104 Mass. 152, 6 Am. Rep. 207; *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Butts v. Phelps*, 79 Mo. 302; *Dazey v. Roleau*, 111 Ill. App. 367; *Coker v. Roper*, 125 Mass. 577; *Rechtschard v. Bank*, 47 Mo. 181.

² *Walker v. Walker*, 5 Helsk. (Tenn.) 425; *Adams v. Robinson*, 65 Ala. 586.

³ *Wilson v. Wilson*, 26 Pa. St. 393.

plan for that prescribed by the plaintiff.”⁴ So, where an agent is instructed to send money by draft or express, and he sends it in currency, or by check, he will be liable for the amount, if loss occurs.⁵ An agent instructed to insure property will be liable for a loss if he neglects to do so;⁶ one directed to sell shares when they reach a certain price, will be liable for any profit lost through his failure to obey the instruction;⁷ and an agent instructed to store goods in a particular warehouse, or to ship them by a designated carrier, will be liable for their loss, if he stores them in a different warehouse, or ships them by some other carrier.⁸

An agent who parts with the goods of his principal, contrary to instructions, may be liable for conversion, as well

⁴ *Wilson v. Wilson*, *supra*.

⁵ *Walker v. Walker*, 5 Helsk. (Tenn.) 425; *Foster v. Preston*, 8 Cow. (N. Y.) 198; *Kerr v. Cotton*, 23 Tex. 411. Where an agent, directed to send a claim to a designated person for collection, sends it to some other person, he will be liable if loss occurs. *Butts v. Phelps*, 79 Mo. 302.

⁶ *Shoenfeld v. Fleisher*, 73 Ill. 404; *Sawyer v. Mayhew*, 51 Me. 398. So, where the agent of an insurance company neglects to cancel a policy, as directed, he will be liable for the amount the company is forced to pay. *Franklin Ins. Co. v. Sears*, 21 Fed. 290; *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513, 8 N. E. 348. But where a factor neglected to sell property as directed, and the same was afterwards destroyed by fire, the delay was held not to be the proximate cause of the loss. *Lehman v. Pritchett*, 84 Ala. 512, 4 South. 601.

⁷ *Bertram v. Godfrey*, 1 Knapp, P. C. (Eng.) 381. So, where an agent, authorized to sell for a specified price, sells for a less price, he is liable for the difference. *Serjeant v. Blunt*, 16 Johns. (N. Y.) 74; *Switzer v. Connett*, 11 Mo. 88. But see *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Dalby v. Stearns*, 132 Mass. 230.

⁸ *Wilts v. Morrall*, 66 Barb. (N. Y.) 511; *Johnson v. New York Central Transp. Co.*, 33 N. Y. 610, 88 Am. Dec. 416.

as upon contract.⁹ Thus where an agent, intrusted with a note for negotiation, and instructed not to part with it except upon payment of the money, delivered it to another for the purpose of getting it discounted, and the latter appropriated the proceeds, the agent was held liable for conversion.¹⁰

(b) **Implied instructions.** Where no specific instructions are given, an agent necessarily must exercise some discretion, and would be liable only for failure to use due care and diligence in safeguarding the interests of his principal.¹¹ Limitations, however, upon his discretion are sometimes implied from the nature of the agency, and he is bound to keep within them.¹² Thus, an agent to collect is ordinarily limited, by implication, to a collection in cash;¹³ and one authorized to sell, must usually sell for cash, and hence would be liable for loss caused by his acceptance of a check.¹⁴ A well established usage may either limit or extend the agent's obligation.¹⁵

§ 148. **Justification for disobedience. (a) Emergency.** In the face of sudden emergency, or other condition,

⁹ *Spencer v. Blackman*, 9 Wend. (N. Y.) 167; *Chase v. Baskerville*, 93 Minn. 402, 101 N. W. 950; *Scott v. Rogers*, 31 N. Y. 676.

¹⁰ *Laverty v. Snethen*, 68 N. Y. 523, 23 Am. Rep. 184.

¹¹ Post § 149.

¹² *Bailey v. Bensley*, 87 Ill. 556; *Story on Agency*, § 189.

¹³ *Langdon v. Potter*, 13 Mass. 319; *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12; *Pitkin v. Harris*, 69 Mich. 133, 37 N. W. 61.

¹⁴ *Harlan v. Ely*, 68 Cal. 522, 9 Pac. 947; *Broughton v. Silloway*, 114 Mass. 71, 19 Am. Rep. 312. Where an agent, though authorized to sell land "on such terms as to him shall seem meet," accepts payment in bonds, which prove worthless, he is liable for the money he should have received. *Paul v. Grimm*, 165 Pa. St. 139, 30 Atl. 721.

¹⁵ Ante, Chap. IX.

where deviation from instructions becomes necessary to protect the principal's interest, the law implies authority in the agent to make reasonable deviation.¹⁶ Thus, if goods are perishable, and in danger of immediate loss, an agent to prevent such loss may deviate from instructions as to the time, place or terms of sale.¹⁷ So, an agent instructed to deposit goods in a particular place, may deviate from instructions, upon learning of facts which raise reasonable apprehensions for the safety of the goods if deposited in such place.¹⁸ And if, without fault of the agent, compliance with instructions becomes impossible, he, of course, is relieved from liability.¹⁹

(b) **Illegal act.** If an agent is instructed to perform an illegal act, he is not liable for disobedience of such instruction; and, so, an agent employed to make an illegal contract will not be liable in damages for failure to perform.²⁰

(c) **Ambiguous instructions.** Where instructions are so ambiguous as to be susceptible of more than one interpretation, and the agent in good faith adopts, and acts upon, an interpretation different from that intended by the principal, he will not be liable for his misunderstanding of their meaning.²¹

¹⁶ *Greenleaf v. Moody*, 13 Allen (Mass.), 363; *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; *Bartlett v. Sparkman*, 95 Mo. 136, 8 S. W. 406.

¹⁷ *Jarvis v. Hoyt*, 2 Hun (N. Y.), 637.

¹⁸ *Drummond v. Wood*, 2 Calnes (N. Y.), 310.

¹⁹ *Weakley v. Pearce*, 5 Helsk. (Tenn.) 401; *Greenleaf v. Moody*, 13 Allen (Mass.), 363.

²⁰ *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Davis v. Bargar*, 57 Ind. 54. In the case of an illegal contract, since the principal could have acquired no rights under it, he suffers no damage by the agent's default.

²¹ *Pickett v. Pearsons*, 17 Vt. 470; *Bessent v. Harris*, 63 N. C.

(d) **Factor's rights.** Where a factor makes advances upon goods, and acquires a lien upon them for reimbursement, and the principal fails to repay the advances, upon due notice, the factor may disregard instructions as to time and terms of sale, which, if followed, would impair the value of his security.²²

§ 149. **Duty to exercise care and diligence.** (a) **In general.** It is the law that an agent, by accepting his appointment, impliedly undertakes to exercise in the performance of his duties that degree of skill, care and diligence which the nature of the undertaking, and the circumstances of performance, reasonably demand, and which is ordinarily exercised by persons of usual capacity and prudence engaged in similar transactions.²³ He is not an insurer of the success of his undertaking, but is liable only for loss that results from his failure to exercise a reasonable degree of care and skill.²⁴ Thus, an agent authorized

542; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67, 21 N. W. 184; *Falksen v. Falls City State Bank*, 71 Neb. 29, 98 N. W. 425.

²² *Brown v. McGran*, 14 Pet. (U. S.) 479; *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Weed v. Adams*, 37 Conn. 378; *Davis v. Kobe*, 36 Minn. 214, 30 N. W. 662. So, generally, in cases of agency coupled with an interest, unreasonable instructions, detrimental to the agent's interests, may be disregarded. *W. W. Gordon & Co. v. Cobb*, 4 Ga. App. 49, 60 S. E. 821.

²³ *Heinemann v. Heard*, 50 N. Y. 35; *Whitney v. Martine*, 88 N. Y. 535; *Leighton v. Sargent*, 27 N. H. 460; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Steiner v. Clisby*, 103 Ala. 181, 15 South. 612; *Isham v. Parker*, 3 Wash. St. 755, 29 Pac. 835.

²⁴ *Page v. Wells*, 37 Mich. 415. In the case of a *del credere* agency, there is a guarantee of any debt arising through the agency, and the *del credere* agent is, therefore, absolutely liable for payment of the same. *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190.

to effect insurance upon his principal's property, must use such care as a reasonably prudent person would exercise in the selection of an underwriter and of a suitable policy.²⁵ An agent authorized to invest money must use reasonable care in the selection of adequate security;²⁶ and an agent authorized to sell on credit, must exercise proper judgment in his choice of purchasers.²⁷ So, an agent to collect money, must act with diligence, and avail himself of the usual means for enforcing payment;²⁸ and in the case of commercial paper, must take all requisite steps to protect the rights of the principal;²⁹ and after collection, must use reasonable care and diligence in transmission of the funds to his principal.³⁰

If an undertaking be one that requires for its proper performance the exercise of expert or professional knowledge and skill, an agent who assumes performance, must bring to the undertaking such knowledge and skill as is possessed

²⁵ *Strong v. High*, 2 Rob. (La.) 103, 38 Am. Dec. 195.

²⁶ *McFarland v. McClees* (Pa.), 5 Atl. 50; *Bank of Owensboro v. Western Bank*, 13 Bush. (Ky.) 526, 26 Am. Rep. 211; *Bannon v. Warfield*, 42 Md. 22. 'An agent authorized to invest his principal's money is bound not only to act in good faith, but to exercise diligence and such skill as is ordinarily possessed by persons of common capacity engaged in the same business. *DeHart v. DeHart*, 70 N. J. Eq. 774, 67 Atl. 1074.

²⁷ *Greeley v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; *Phillips v. Moir*, 69 Ill. 155; *Frick & Co. v. Larned*, 50 Kan. 776, 32 Pac. 383.

²⁸ *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Wiley v. Logan*, 95 N. C. 358; *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Reed v. Northrup*, 50 Mich. 442, 15 N. W. 543.

²⁹ *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Chapman v. McCrea*, 63 Ind. 360.

³⁰ *Morgan v. Richardson*, 13 Allen (Mass.), 410; *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58.

by competent men engaged in a like trade or calling.³¹ Thus, an attorney or physician would be liable for damages caused through a failure to possess, or apply, such knowledge and skill as is ordinarily possessed by competent men in his profession;³² but not for mere errors of judgment which may occur in spite of proper professional attainment.³³ Where, however, a person who does not hold himself out as an expert is engaged to render services, for which ordinarily an expert is employed,—as where a non-professional man is called upon to aid in sickness, or in the trial of a case,—there clearly is no undertaking on his part to bring to the performance of the service the knowledge and skill of an expert, and hence he will not be liable for failure to exercise the same.³⁴

(b) **Gratuitous agent.** Where an agency is gratuitous, there is no obligation upon the agent to start upon performance, and hence no damages can be recovered for his failure to do so.³⁵ Having entered upon performance, however, his obligations become practically the same as those of a paid agent; and he will be liable for failure to obey instructions, or to exercise the degree of skill or care deemed to be reasonable under the circumstances of the

³¹ *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 338; *Varnum v. Martin*, 15 Pick. (Mass.) 440; *Stanton v. Bell*, 9 N. C. 145, 11 Am. Dec. 744.

³² *Wilson v. Russ*, 20 Me. 421; *Stimpson v. Sprague*, 6 Greenl. (Me.) 470; *O'Barr v. Alexander*, 37 Ga. 195; *Stevens v. Walker*, 55 Ill. 151; *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655; *Jamison v. Weaver*, 81 Iowa, 212, 46 N. W. 996; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363.

³³ *Watson v. Muirhead*, 57 Pa. St. 161, 98 Am. Dec. 213; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Citizens', etc., Ass'n v. Friedley*, 123 Ind. 143, 23 N. E. 1075.

³⁴ *Felt v. School District*, 24 Vt. 297; *Mechem on Agency*, § 496.

³⁵ *Thorne v. Dees*, 4 Johns. (N. Y.) 84; *Anson on Contract*, 333.

case.³⁶ It is sometimes stated as the rule that a gratuitous agent, or bailee, is liable only for gross negligence.³⁷ But gross negligence, as remarked by an English judge, is merely negligence "with the addition of a vituperative epithet."³⁸ Thus, the fact that an attorney or physician agreed to render professional services without remuneration would not relieve him from liability for failure to exercise a reasonable degree of professional care and skill.³⁹ So, where a banker offered gratuitously to manage investments for his customers, he was held to the exercise of the skill and knowledge commensurate with the undertaking, "and was not at liberty to withhold from his agency the exercise of the skill and knowledge which he held himself out to possess."⁴⁰

The real test always is the degree of care that the agent undertakes to exercise. That measures his obligation, and hence his liability. The fact that the services were gratuitously rendered, is usually of importance only in determining what degree of care he undertook to exercise. Thus, if one were to make casual inquiry of a lawyer concerning

³⁶ *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *McNevin v. Lowe*, 40 Ill. 209; *Carpenter v. Blake*, 50 N. Y. 696; *Eddy v. Livingston*, 35 Mo. 487, 88 Am. Dec. 122; *Briere v. Searls*, 126 Wis. 347, 105 N. W. 817.

³⁷ *Hammond v. Hussey*, 51 N. H. 40, 12 Am. Rep. 41; *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; *Grant v. Ludlow*, 8 Ohio St. 1; *Swentzel v. Bank*, 147 Pa. St. 140, 23 Atl. 405.

³⁸ *Rolfe, B. in Wilson v. Brett*, 11 M. & W. 113; *New York Central Ry. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Gill v. Middleton*, 105 Mass. 477; *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084; *Colyar v. Taylor*, 1 Cold. (Tenn.) 372.

³⁹ *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *McNevin v. Lowe*, 40 Ill. 209.

⁴⁰ *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084.

some point of law, the latter clearly does not undertake to exercise the same degree of care in giving an answer as he would undertake were he employed to render an opinion.⁴¹ So, a merchant, who is shipping goods abroad and consents gratuitously to ship in the same consignment a case of goods belonging to another, would not be liable, as would a paid shipping agent, were the goods seized because of his inadvertent entry of them under an improper designation.⁴² But on the other hand, where a person gratuitously undertakes to make repairs he will be liable for injury caused by his failure to use ordinary care and skill in making them; and the degree of care required will be determined primarily by the degree of skill which he professed to have and undertook to exercise.⁴³

§ 150. Duty to act in good faith. (a) In general. The relation of principal and agent is essentially one of great trust and confidence, and it is the paramount duty of the agent to exercise toward his principal the highest degree of good faith. Failure so to do usually entitles a principal to repudiate, even against third parties, a transaction tainted with bad faith, and of course creates rights and remedies in his favor against the agent.

⁴¹ *Fish v. Kelly*, 17 C. B. (N. S.) (Eng.) 194.

⁴² *Shiells v. Blackburne*, 1 H. Bl. (Eng.) 159. See *Eddy v. Livingston*, 35 Mo. 487, 88 Am. Dec. 122. "If, in this case, a ship broker, or a clerk in the custom house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries." *Shiells v. Blackburne*, *supra*.

⁴³ *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548. See *Briggs v. Spaulding*, 141 U. S. 132; *Steamboat v. King*, 16 How. (U. S.) 469.

(b) **Acting as agent and party.** Without full knowledge and consent of the principal, an agent can not deal with himself in a transaction in which he acts as agent.⁴⁴ Hence an agent authorized to buy property, can not, directly or indirectly, buy from himself;⁴⁵ nor can an agent authorized to sell property become, directly or indirectly, the purchaser.⁴⁶ The principal may repudiate a transaction in which the agent's interests were antagonistic to his own, regardless of whether he suffered a loss.⁴⁷ The rule, of course, is the same where an agent, without authority, acts for both parties to a transaction. Either may repudiate the transaction.⁴⁸

⁴⁴ *Michoud v. Girod*, 4 How. (U. S.) 503; *People v. Township Board*, 11 Mich. 222; *Bunker v. Miles*, 30 Me. 431, 1 Am. Rep. 632; *Swindell v. Latham*, 145 N. C. 144, 58 S. E. 1010; *Leigh v. American Brake Beam Co.*, 205 Ill. 147, 68 N. E. 713. An agent will not be permitted to deal in his own behalf with his principal with reference to the subject matter of the agency, unless he makes full, complete and honest disclosure of the truth of the transaction. *Curry v. King*, 6 Cal. App. 568, 92 Pac. 662.

⁴⁵ *Conkey v. Bond*, 36 N. Y. 427; *Disbrow v. Secor*, 58 Conn. 35, 18 Atl. 981; *Colbert v. Shepard*, 89 Va. 401, 16 S. E. 246; *Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924.

⁴⁶ *Copeland v. Insurance Co.*, 6 Pick. (Mass.) 198; *Bain v. Brown*, 56 N. Y. 285; *Euneau v. Rieger*, 105 Mo. 659, 16 S. W. 854; *Francis v. Kerker*, 85 Ill. 190; *George N. Pierce Co. v. Beers*, 190 Mass. 199, 76 N. E. 603. Any person purchasing from the agent in the latter's interest will hold as trustee for the principal. *Hughes v. Washington*, 72 Ill. 84; *McKay v. Williams*, 67 Mich. 547, 35 N. W. 159.

⁴⁷ *People v. Township Board*, 11 Mich. 222; *Taussig v. Hart*, 58 N. Y. 425; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Williams v. Moore-Gaunt Co.*, 3 Ga. App. 756, 60 S. E. 372.

⁴⁸ *New York Cent. Ins. Co. v. Insurance Co.*, 14 N. Y. 85; *Shirland v. Iron Works*, 41 Wis. 162; *Truslow v. Parkersburg, etc., Ry. Co.*, 61 W. Va. 628, 57 S. E. 51; *Todd v. German American Ins. Co.*, 2 Ga. App. 789, 59 S. E. 94. The good faith which under-

(c) **Acquiring adverse interest.** Since it is the duty of an agent to look to the interests of his principal, he can not acquire for himself rights or interests which it is his duty to secure for his principal; nor can he take advantage of knowledge gained by reason of his confidential position to acquire interests adverse to his principal.⁴⁹ Thus, where an agent employed to purchase property for his principal, buys the same for himself, he will hold it as trustee for the principal, who can enforce conveyance of the legal title.⁵⁰ Where the agent buys with his own money it is frequently held that to enforce conveyance to the principal would be violative of the statute of frauds, which requires that creation of trusts in land be proved by a writing signed by the party who declares the trust.⁵¹ Other well considered cases, however, hold that the trust will arise by implication of law, and that upon tender of purchase price and his reasonable compensation, the principal may enforce conveyance of the property from the agent.⁵² Nor will it

lie the relation of agency prohibits a person from acting as agent of opposing parties. *Madden v. Cheshire* (Kan.), 94 Pac. 793.

⁴⁹ *Sweet v. Jacocks*, 6 Paige (N. Y.), 355, 31 Am. Dec. 252; *Ringo v. Binn*, 10 Pet. (U. S.) 269; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Thorne v. Brown*, 63 W. Va. 603, 60 S. E. 614.

⁵⁰ *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554; *Vallette v. Tedens*, 122 Ill. 607, 14 N. E. 52; *Bergner v. Bergner*, 219 Pa. St. 113, 67 Atl. 999. The clerk of a broker employed to sell land, who has access to the correspondence of the seller, stands in such a relation of trust to the latter that if he purchases the land he will hold it as trustee. *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192.

⁵¹ *Burden v. Sheridan*, 36 Iowa, 125, 14 Am. Rep. 505; *Watson v. Erb*, 33 Ohio St. 35; *Collins v. Sullivan*, 135 Mass. 461; *Botsford v. Burr*, 2 Johns. (N. Y.) 404.

⁵² *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554; *Boswell v. Cunningham*, 32 Fla. 277, 13 South. 354.

always be deemed necessary that the agent was employed specifically to secure the property.⁵³ Thus, in an Illinois case, where the confidential agent of the lessee of a theater learning, by virtue of his position, that his principal's lease was about to expire, and knowing that the same was of great value, secretly secured a renewal in his own name, he was declared a trustee for his principal.⁵⁴

In application of the same principle, it is held that where an agent in the course of his employment learns of a defect in his principal's title, he may not use his knowledge to acquire title for himself.⁵⁵ And if he discovers the existence of a claim against his principal and purchases the same at a discount, he can enforce the claim only for the amount for which he purchased it.⁵⁶ So, an agent can not acquire adverse rights which arose through his own neglect of duty.⁵⁷ Thus, an agent who neglects to pay taxes on his principal's property can not retain title to the same, acquired at a subsequent tax sale, but will hold it for the benefit of the principal.⁵⁸

(d) May not deny title. Where an agent receives money or property for his principal, he will not, as a rule, be heard to deny the principal's title; nor to set up title in a third person, where the principal seeks to recover the

⁵³ *Gower v. Andrews*, 59 Cal. 119, 43 Am. Rep. 242; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304.

⁵⁴ *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541.

⁵⁵ *Cameron v. Lewis*, 56 Miss. 76; *Case v. Carroll*, 35 N. Y. 385; *Ringo v. Binns*, 10 Pet. (U. S.) 269.

⁵⁶ *Smith v. Brotherline*, 62 Pa. St. 461; *Noyes v. Landon*, 59 Vt. 569, 10 Atl. 342.

⁵⁷ *Briggs v. Hodgson*, 78 Me. 514, 7 Atl. 387; *Barton v. Moss*, 32 Ill. 50; *Fox v. Zimmerman*, 77 Wis. 414, 46 N. W. 533.

⁵⁸ *Krutz v. Fisher*, 8 Kan. 90; *Murdock v. Milner*, 84 Mo. 96; *Gonzalla v. Bartlesman*, 143 Ill. 634, 32 N. E. 532; *Gelsinger v. Beyl*, 80 Wis. 443, 50 N. W. 501.

property from him.⁵⁹ Thus, where an agent receives money for his principal, under an illegal contract, he can not defeat the principal's claim to the money by setting up the illegality of the contract under which the money was paid.⁶⁰ So, where money is given him by the principal for an illegal purpose, he can not, on that ground, refuse to refund the same upon the principal's demand.⁶¹

The agent may show, however, that since receipt by him of property, the principal has parted with title;⁶² or that he himself has been divested of possession by proof of title in another.⁶³ So, where money is paid an agent under circumstances entitling the person who paid it to recover the same,⁶⁴ and it has been so recovered, the agent may set up that fact when called upon to account.⁶⁵

⁵⁹ *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Von Hunter v. Spengeman*, 17 N. J. Eq. 185; *Witman v. Felton*, 28 Mo. 601.

⁶⁰ *Baldwin v. Potter*, 46 Vt. 402; *Norton v. Blinn*, 39 Ohio St. 145; *Dillman v. Hastings*, 144 U. S. 136. Where money is paid an agent for his principal, the legality of the action of which it is the fruit, or with which it was connected does not affect the right of the principal to recover it. *Cheuvront v. Horner*, 62 W. Va. 476, 59 S. E. 964. But see *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707.

⁶¹ *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Kiewert v. Rindskorf*, 46 Wis. 481, 1 N. W. 163. The law making void, contracts in reference to business carried on in disregard of the privilege tax does not shield an agent from liability for misappropriation of funds in the conduct of such business. *Decell v. Hazelhurst Oil Co.*, 83 Miss. 346, 35 South. 761.

⁶² *Marvin v. Ellwood*, 11 Paige (N. Y.), 365; *Roberts v. Noyes*, 76 Me. 590; *Snodgrass v. Butler*, 54 Miss. 45.

⁶³ *Burton v. Wilkinson*, 18 Vt. 185, 46 Am. Dec. 145; *Bliven v. Railway Co.*, 36 N. Y. 403.

⁶⁴ Ante § 138.

⁶⁵ *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Murray v. Mann*, 2 Ex. (Eng.) 538.

(e) **May not make a profit.** Any profit accruing to an agent from performance of his agency, other than his compensation, will be held by him for the benefit of his principal.⁶⁶ Thus, where an agent, authorized to sell at a stipulated price, sells for a higher price, he can not, in the absence of an agreement, keep the difference;⁶⁷ and the rule would be the same where he purchases property at less than the authorized price.⁶⁸ So, an agent to sell, who is authorized to keep whatever he can obtain over a specified sum, would be bound to inform his principal of facts, subsequently discovered, which substantially increased the value of the property.⁶⁹ And, generally, an agent must account to the principal for all commissions, discounts or other personal benefits which accrue to him from third persons by reason of his position as agent.⁷⁰

(f) **Failure to give notice.** Where a principal suffers loss by reason of failure of his agent to give prompt notice

⁶⁶ *Bain v. Brown*, 56 N. Y. 285; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Graham v. Cummings*, 208 Pa. St. 516, 57 Atl. 943; *Albright v. Phoenix Ins. Co.*, 72 Kan. 591, 84 Pac. 383; *Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261, 52 S. E. 898. If the profit results from fraudulent violation of duty, the fraud may be waived and recovery had as on implied contract for money had and received. *Schick v. Suttle*, 94 Minn. 135, 102 N. W. 217.

⁶⁷ *Cutter v. Demmon*, 111 Mass. 474; *Merryman v. David*, 31 Ill. 404; *Blanchard v. Jones*, 101 Ind. 542; *Kramer v. Winslow*, 154 Pa. St. 637, 25 Atl. 766.

⁶⁸ *Ely v. Hanford*, 65 Ill. 267; *Keyes v. Bradley*, 73 Iowa, 589, 35 N. W. 656; *Duryea v. Vosburg*, 138 N. Y. 621, 33 N. E. 932; *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873; *Kevanne v. Miller*, 4 Cal. App. 598, 88 Pac. 643.

⁶⁹ *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785; *Snell v. Goodlander*, 90 Minn. 533, 97 N. W. 421.

⁷⁰ *Morgan v. Aldrich*, 114 Mo. App. 700, 91 S. W. 1024; *State v. State Journal Co.*, 77 Neb. 752, 110 N. W. 763. Where an agent receives from another additional compensation for services that

of facts affecting his rights, the agent will be liable in damages.⁷¹ Thus, an agent authorized to sell property upon specified terms, upon learning that a better sale can be made, is bound to notify his principal, before concluding the sale that was authorized.⁷² So, generally, where property intrusted to his care is seized on legal process, or a purchaser of goods becomes insolvent, or a note due the principal is not paid at maturity, the agent is bound to give prompt notice to his principal.⁷³

§ 151. Duty to account. ^{and pay over.} (a) In general. It is, of course, the duty of the agent to account to the principal for all funds received by him in the performance of his agency; and to this end, the obligation is upon him to keep accurate and suitable records or accounts of all his dealings, including receipts and disbursements.⁷⁴ An agent is required, furthermore, to keep the money and goods of his principal separate and distinct from his own, or from those of third persons.⁷⁵ If an agent commingles his principal's goods with his own, the burden is upon him to identify his own, and if he fails to do so, the principal may claim the

he is already bound to render for his principal, he usually must account for the same to the principal, unless the additional reward was an independent gratuity. See *Gay v. Paige*, 150 Mich. 463, 114 N. W. 217.

⁷¹ *Harvey v. Turner*, 4 Rawle. (Pa.) 222.

⁷² *Snell v. Goodlander*, 90 Minn. 533, 97 N. W. 421.

⁷³ *Devall v. Burbridge*, 4 Watts & S. (Pa.) 305; *Forrestier v. Bordman*, 1 Story (U. S.), 43.

⁷⁴ *Keighler v. Manufacturing Co.*, 12 Md. 383, 71 Am. Dec. 600; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Dodge v. Hatchett*, 118 Ga. 883, 45 S. E. 667; *Quirk v. Quirk*, 155 Fed. 199.

⁷⁵ *Kennesaw Guano Co. v. Wappoo Mills*, 119 Ga. 776, 47 S. E. 205.

whole mass.⁷⁶ So, if an agent mingles the principal's funds with his own, and the mingled funds are lost, he will be liable for the principal's loss.⁷⁷ Thus, where an agent deposits funds of his principal to his individual credit in a bank, he will be liable for the amount if the same be lost through failure of the bank.⁷⁸

(b) **Duty to pay over.** The time at which an agent is bound to pay over to his principal money in his possession must be determined from the contract of employment, the principal's instructions, and the nature of the agency.⁷⁹ In the absence of express or implied authority to longer retain it, an agent receiving money for his principal is bound to remit the same with promptness.⁸⁰ An agent would usually be entitled to deduct his commissions out of funds received, but could not, as a rule, apply the same to the payment of an independent debt due him from the principal.⁸¹

⁷⁶ *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *First Nat. Bank v. Kilbourne*, 127 Ill. 573, 20 N. E. 681.

⁷⁷ *Bartlett v. Hamilton*, 46 Me. 435; *Pickney v. Dunn*, 2 S. C. 314; *Cartmeil v. Allard*, 7 Bush. (Ky.) 482.

⁷⁸ *Mason v. Whitthorne*, 2 Cold. (Tenn.) 242; *Norris v. Hero*, 22 La. Ann. 605; *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289; *Williams v. Williams*, 55 Wis. 300, 12 N. W. 465.

⁷⁹ *Brown v. Arrott*, 6 Watts & S. (Pa.) 418; *Watson v. Bank*, 8 Metc. (Mass.) 217, 41 Am. Dec. 500; *Zuck v. Culp*, 59 Cal. 142; *Lillie v. Hoyt*, 5 Hill (N. Y.), 395, 40 Am. Dec. 360; *Leake v. Sutherland*, 25 Ark. 219. Where an agent, having in his possession for sale a number of organs and also a number of notes for collection, refuses to deliver the same to the owner, he is liable for conversion. *Bridgeport Organ Co. v. Snyder*, 147 N. C. 271, 61 S. E. 51.

⁸⁰ *Eaton v. Welton*, 32 N. H. 352; *Clark v. Moody*, 17 Mass. 145; *Campbell v. Roe*, 32 Neb. 345, 49 N. W. 452; *Mast v. Easton*, 33 Minn. 161, 22 N. W. 253.

⁸¹ *Vinton v. Baldwin*, 95 Ind. 433; *White v. Railway Co.*, 90 Ala. 254, 7 South. 910; *Shearman v. Morrison*, 149 Pa. St. 386, 24 Atl.

(c) **Demand.** It has frequently been held that no right of action for money received by the agent arises until proper demand has been made.³² In cases, however, where the agent has clearly violated a fixed obligation to pay over money immediately upon its receipt, it would seem that demand would not be necessary.³³ Where an agent retains money after demand, or keeps it wrongfully, in cases where no demand is necessary, he would be liable for interest from the date upon which the money became due.³⁴

§ 152. **Subagents.** Whether an agent is liable to his principal for misconduct or default of a subagent, or whether the latter is directly liable, depends upon whether privity of contract can be shown to exist between the principal and subagent, or whether the latter is deemed merely an agent of the original attorney. If such privity exists, the original agent is liable only for failure to exercise reasonable care in the selection of the subagent. If there is no privity between subagent and principal, the original agent is absolutely liable for the misconduct of the subagent, who, in that event, is his agent, and a stranger to

313; *Tagg v. Bowman*, 108 Pa. St. 273, 56 Am. Rep. 204. In an action against an agent for money in his hands, the burden is on him to give an account, where he claims commissions for disbursements. *Hildreth v. Ayer & Lord Tie Co.*, 32 Ky. Law Rep. 1212, 108 S. W. 255.

³² *Heddens v. Younglove*, 46 Ind. 212; *Baird v. Walker*, 12 Barb. (N. Y.) 228; *Hammett v. Brown*, 60 Ala. 498; *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Claypool v. Gish*, 108 Ind. 424, 9 N. E. 382.

³³ *Lillie v. Hoyt*, 5 Hill (N. Y.), 395, 40 Am. Dec. 360; *Jett v. Hempstead*, 25 Ark. 463; *Bedell v. Janney*, 9 Ill. 193; *Conley v. Betts*, 24 Wend. (N. Y.) 203; *Haas v. Damon*, 9 Iowa, 589.

³⁴ *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Anderson v. State*, 2 Ga. 370; *Hyman v. Gray*, 49 N. C. 155; *Wheeler v. Haskins*, 41 Me. 482.

Foster v. Preston, 12 28, 8 Cowen (N.Y. Sm. Ct.) 448.

the principal. The rule is difficult of practical application, and the cases, naturally, are conflicting.⁸⁵ If a bank, for instance, undertook the collection of a note, and sent one of its regular employees to collect it, there clearly is no privity between him and the owner, and the bank would be liable for his default.⁸⁶ But where the note is payable at a distant place, and the bank sends it for collection to a correspondent there, its obligation by the weight of authority, extends no further than to the use of care in the selection of the correspondent.⁸⁷ Other cases hold the first bank to greater liability.⁸⁸ The same rules apply, in the main, to attorneys, who take claims for collection; though some of the courts incline to hold attorneys to higher responsibility than banks, for the misconduct of correspondents.⁸⁹

⁸⁵ Ante § 37.

⁸⁶ *Gerhardt v. Boatmens' Sav. Inst.*, 38 Mo. 60, 90 Am. Dec. 407; *Mechem on Agency*, § 514.

⁸⁷ *Dorchester, etc., Bank v. Bank*, 1 Cush. (Mass.) 177; *East Haddam Bank v. Scovill*, 12 Conn. 303; *Guelckh v. National State Bank*, 56 Iowa, 434, 9 N. W. 328; *Daly v. Bank*, 56 Mo. 94; *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422, 2 Atl. 687; *Willson v. Bank*, 187 Ill. 222, 58 N. E. 250.

⁸⁸ *Exchange Nat. Bank v. Bank*, 112 U. S. 276; *Ayraunt v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Streissguth v. Bank*, 43 Minn. 50, 44 N. W. 797.

⁸⁹ *Bradstreet v. Everson*, 72 Pa. St. 124, 13 Am. Rep. 665; *Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264; *Weyerhaeuser v. Dun*, 100 N. Y. 150, 2 N. E. 274. See *Landa v. Traders' Bank*, 118 Mo. App. 256, 94 S. W. 770. Where the liability is made to turn largely on whether the original agent agrees for compensation to collect the claim.

CHAPTER XV.

OBLIGATIONS OF PRINCIPAL TO AGENT.

- § 153. In general.
- 154. Compensation.
 - (a) In general.
 - (b) Ratification.
 - (c) Amount of compensation.
- 155. When compensation is due.
- 156. Revocation of authority.
 - (a) In general.
 - (b) Revocation in violation of contract.
 - (c) Agent's misconduct.
 - (d) Revocation by law.
- 157. Renunciation by agent.
 - (a) In general.
 - (b) Entire and severable contracts.
- 158. Obligation to reimburse.
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 - (a) In general.
 - (b) Illegal acts.
- 160. Lien of agent.
- 161. Special lien.
 - (a) In general.
 - (b) Requisites of lien.
 - (c) Enforcement of lien.
- 162. Stoppage in transitu.

§ 153. In general. The liabilities of a principal to his agent are founded, of course, upon the contract of employment between them. The rules governing such liability are merely those of the law of contracts as applied to the contract of agency, and shall be little more than indicated in this, the concluding chapter, of our discussion. The

broad duty that an employer owes to any employee to furnish him a safe place in which to work, as well as proper instrumentalities for performance of his service, and to use care in selection of competent fellow-workmen, might conceivably arise where the relation existing was that of principal and agent, but in practically all instances, where damages are recovered for failure to properly perform such duties, the relation is that of master and servant; and the rules determining the liability in question will be found discussed under other, and appropriate, topics of the law.¹ Keeping within the confines of our subject, it may be stated, in general terms, that it is the duty of the principal to pay his agent such remuneration as was expressly or impliedly agreed upon,⁽²⁾ to reimburse him for expenses properly incurred in performance of the agency, and to indemnify him⁽³⁾ for personal loss consequent upon due execution of his authority.

§ 154. Compensation. (a) In general. An obligation to remunerate another for services rendered can arise only from express or implied agreement. One man can not make another his debtor without that other's assent. Where, by the terms of a contract of employment, compensation is expressly promised, the obligation to pay the same is clear. But even in the absence of express promise, an agreement to compensate arises, by implication of law, where, upon request or with acquiescence, services are rendered of such a nature, or under such circumstances, as to indicate an expectation of remuneration.² Thus, if one is requested to perform for another services which ordinarily are remuner-

¹ Cooley on Torts, Chap. XVIII.

² Lewis v. Trickey, 20 Barb. (N. Y.) 387; Mangum v. Ball, 43 Miss. 288, 5 Am. Rep. 488; Story on Agency, § 324.

ated, a promise to pay for the same will readily be implied.³ So, where services are volunteered under circumstances indicating that they are conditioned upon compensation, acceptance of them will raise an implication of a promise to remunerate.⁴

Where, however, no acquiescence in performance is shown, or where the circumstances do not indicate that compensation was expected as a matter of right, no promise to pay is implied, and no obligation to do so exists.⁵ Thus, the law will not imply an obligation in a father to compensate his daughter for ordinary filial services rendered by her; for, in the absence of a contrary agreement, the inference arises that such services were gratuitously rendered.⁶ So, where services are rendered as a mere act of kindness or accommodation, or with the mere hope of voluntary reward, the fact that they were accepted, or even requested, does not imply a promise to pay for them.⁷ And, so, where services are rendered for the purpose of inducing future employment, as where drawings or estimates are prepared

³ *Van Arman v. Byington*, 38 Ill. 443; *Weeks v. Holmes*, 12 Cush. (Mass.) 215. If a person for whom such services were rendered alleges that they were to be gratuitous, the burden is upon him to establish that understanding. *Dougherty v. Whitehead*, 31 Mo. 255.

⁴ *Muscott v. Stubbs*, 24 Kan. 520; *McCary v. Ruddick*, 33 Iowa. 521; *James v. Bixby*, 11 Mass. 34; *Weston v. Davis*, 24 Me. 374; *Garrey v. Stadler*, 67 Wis. 512, 30 N. W. 787.

⁵ *Hill v. Williams*, 59 N. C. 242; *Morris v. Barnes*, 35 Mo. 412.

⁶ *Hall v. Hall*, 44 N. H. 293; *Briggs v. Briggs*, 46 Vt. 571; *Morton v. Rainey*, 82 Ill. 215, 25 Am. Rep. 311; *Byrnes v. Clark*, 57 Wis. 13, 14 N. W. 815; *Hill v. Hill*, 121 Ind. 255, 23 N. E. 87.

⁷ *Wood v. Brewer*, 66 Ala. 570; *Lange v. Kaiser*, 34 Mich. 318; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 23, 11 Am. Dec. 237; *Mecham on Agency*, § 600.

for submission in competition for a contract, no promise is implied to pay for such services.⁸

(b) **Ratification.** Where acts are performed by one person in behalf of another, without authority, they are in no way binding upon him; and no obligation arises to pay for such unauthorized service. Ratification, however, as we have seen, is equivalent to precedent authority, and invests the agent with the same rights against the principal as would have existed had he acted in pursuance of authority duly given.⁹ It follows, therefore, that if a person ratifies acts done in his behalf without authority, he incurs the same liability for compensation as would have existed had the acts been precedently authorized.¹⁰

(c) **Amount of compensation.** Where the parties expressly agree as to the amount of compensation, the terms of their agreement will be conclusive.¹¹ So, if by agreement it is left to the principal to fix the compensation at his discretion, the agent will be limited in his recovery to the amount so fixed by the principal, provided the latter acts fairly and in good faith.¹² In the absence of express agreement, the law implies a promise to pay what the services are reasonably worth.¹³ The value of particular serv-

⁸ *Scott v. Maler*, 56 Mich. 554, 23 N. W. 218; *Palmer v. Haverhill*, 98 Mass. 487.

⁹ Ante § 62.

¹⁰ *Wilson v. Dame*, 58 N. H. 392; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549. Where a real estate agent departs from authority in effecting a sale, upon ratification he may recover the compensation fixed in the original contract of employment. *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882.

¹¹ *Wallace v. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620; *Hamilton v. Frothingham*, 59 Mich. 253; *Haas v. Malto-Grapo Co.*, 148 Mich. 358, 111 N. W. 1059.

¹² *Butler v. Winona Mill. Co.*, 28 Minn. 205, 9 N. W. 697.

¹³ *McCrary v. Ruddick*, 33 Iowa, 520; *Millar v. Cuddy*, 43 Mich.

ices is a question of fact to be determined from the nature of the services, the skill exercised, and the time consumed, in their performance, and the opinion of qualified experts as to their worth.¹⁴ Where an agent employed for a stated term at a fixed compensation continues in service after the expiration of the term, the inference arises that he continues at the old compensation.¹⁵

§ 155. When compensation is due. Compensation for services ordinarily does not become due until the services have been performed. Thus, if a broker undertakes to sell land on commission, the commission is not due until the sale has been made.¹⁶ But where the agent has accomplished all that he set out to do, his right to compensation can not be defeated by refusal of the principal to avail himself of the benefit of the services.¹⁷ Thus where a broker employed to secure a loan finds a lender able and willing

273, 5 N. W. 316. Where a non-professional agent sold land under a general promise of compensation, he would be entitled to the amount usually paid to a regular broker for like services. *Stewart v. Soubral & Tucker*, 119 La. 211, 43 South. 1009. See *Fredrickson v. Locomobile Co.*, 78 Neb. 775, 111 N. W. 845.

¹⁴ *Ruckman v. Bergholz*, 38 N. J. Law, 531; *Eggleston v. Boardman*, 37 Mich. 14; *Bowen v. Bowen*, 74 Ind. 470; *Miller v. Smith*, 112 Mass. 470; *Mechem on Agency*, § 606. Where amount of commissions is regulated by usage or custom, it will be inferred that the parties dealt with reference thereto, and evidence of the amount so fixed would be competent. *Stanton v. Embrey*, 93 U. S. 548.

¹⁵ *Wallace v. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620. See *Tallon v. Mining Co.*, 55 Mich. 147; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176.

¹⁶ *Jones v. Adler*, 34 Md. 440; *Walker v. Tirrell*, 101 Mass. 257; *Hinds v. Henry*, 36 N. J. Law, 328; *Irby v. Lawshe*, 62 Ga. 216; *Bradlee v. Southern Coast Lumber Co.*, 193 Mass. 378, 79 N. E. 777.

¹⁷ *Holden v. Starks*, 159 Mass. 503, 34 N. E. 1069; *Attrill v. Patterson*, 58 Md. 226.

to make the same, his services have been performed, and he is entitled to compensation regardless of whether the principal accepts the loan.¹⁸ And the rule would be the same where a purchaser is found for land.¹⁹ So, it has been held that where an agent is entitled to commissions on orders, an arbitrary refusal to accept orders secured by him, will not defeat his right to recover.²⁰

§ 156. **Revocation of authority.** (a) **In general.** In the absence of contrary agreement, a principal at any time before performance may, without liability, revoke the authority of an agent.²¹ Hence where compensation is contingent on complete performance,—as in the case of an agency to sell land on commission,—and authority is withdrawn before performance, no liability for unearned commissions arises.²² Where, however, the services of the agent have been the efficient cause of bringing negotiations to a conclusion, his undertaking has been accomplished, and the principal can not deprive him of commissions by revoking

¹⁸ *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447.

¹⁹ *Mooney v. Elder*, 56 N. Y. 238; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Cassady v. Seeley*, 69 Iowa, 509, 29 N. W. 432; *Desmond v. Stebbin*, 140 Mass. 339, 5 N. E. 150.

²⁰ *Jacquin v. Boutard*, 157 N. Y. 686, 51 N. E. 1091. Under a contract that no commissions are to be paid on orders not accepted and that acceptance is at discretion of the principal, the agent can not collect for orders not accepted. *Temby v. Williams Brunt Pottery Co.*, 229 Ill. 540, 82 N. E. 336. Unless there be a showing of bad faith, such as a refusal merely for sake of defeating commissions. *Wolfson v. Allen Bros. Co.*, 120 Iowa, 445, 94 N. W. 910.

²¹ Ante § 68.

²² *Walker v. Tirrel*, 101 Mass. 257, 3 Am. Rep. 352; *Hinds v. Henry*, 36 N. J. Law, 328; *North Carolina Ins. Co. v. Williams*, 91 N. C. 69, 49 Am. Rep. 637; *Morrow v. Tunkhannock Ice Co.*, 211 Pa. St. 445, 60 Atl. 1004.

the authority and completing the transaction himself.²³ So, where the nature of an undertaking is such that each day's service, as rendered, is of distinct value to the principal, the law will imply a promise to remunerate for part performance, notwithstanding that compensation was fixed on the basis of complete performance, and authority was revoked before the undertaking was accomplished.²⁴ It is, of course, competent for the parties to provide either way for such contingencies, and their express agreement will always govern.²⁵

(b) **Revocation in violation of contract.** Where the contract of employment is for a stipulated term, or until the completion of a designated task, revocation of authority, in violation of its terms, will render the principal liable for damages.²⁶ The agent in such case may treat the contract of employment as rescinded and sue upon *quantum meruit* for services rendered;²⁷ or he may stand by the contract and recover damages for its breach.²⁸ Electing the latter remedy, he may sue at once and recover probable

²³ *Lincoln v. McClatchie*, 36 Conn. 136; *Sussdorff v. Schmidt*, 55 N. Y. 319; *S. H. Green & Sons v. Freund*, 80 C. C. A. 387, 150 Fed. 721; *Morton v. J. I. Case Mach. Co.*, 99 Mo. App. 630, 77 S. W. 434.

²⁴ *Chambers v. Seay*, 73 Ala. 372; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Urquhart v. Mortgage Co.*, 85 Minn. 69, 88 N. W. 264.

²⁵ *Spear v. Gardner*, 16 La. Ann. 383; *Adriance v. Rutherford*, 57 Mich. 170; *Reeves & Co. v. Watkins*, 28 Ky. Law Rep. 401, 89 S. W. 266.

²⁶ Ante 68 (b).

²⁷ *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Derby v. Johnson*, 21 Vt. 17; *Brinkley v. Swicegood*, 65 N. C. 626.

²⁸ *Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *James v. Allen County*, 44 Ohio St. 226, 6 N. E. 246; *Geo. O. Richardson Mach. Co. v. Swartzel*, 70 Kan. 773, 79 Pac. 660.

damages;²⁹ or he may wait until the expiration of the term, and recover the actual damages sustained.³⁰ In either event, the measure of damages would ordinarily be the amount of compensation fixed by the contract.³¹ But the principal may reduce the amount of recovery by showing that the agent did, or by the use of diligence could have made up his loss, or part of it, by securing other employment.³² The duty to seek other employment does not require, however, that the agent accept service of an entirely different or more menial kind than that for which he had been engaged;³³ nor is it incumbent upon him to seek far fields in his search for work.³⁴

Where payment of compensation is, in any event, contingent on success, as in the case of commissions for sale of land, a revocation of authority, contrary to agreement, would not ordinarily entitle the agent to the amount of the commission by way of damages; for there is no certainty that he would have met with success. He could recover merely for his time and trouble, or for the reasonable value

²⁹ *Britt v. Hays*, 21 Ga. 157; *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1011; *Pierce v. Railway Co.*, 173 U. S. 1.

³⁰ *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140; *Sutherland v. Wyer*, 67 Me. 64; *Weed v. Burt*, 78 N. Y. 192; *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1011.

³¹ *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584; *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381.

³² *Sutherland v. Wyer*, 67 Me. 64; *Ansley v. Jordon*, 61 Ga. 482; *Barker v. Knickerbocker Ins. Co.*, 24 Wis. 630; *Hamilton v. Love*, 152 Ind. 641, 53 N. E. 181; *Horn v. Western Land Ass'n*, 22 Minn. 233. *Clark v. Marshall*.

³³ *Wolf v. Studebaker*, 65 Pa. St. 459; *Costigan v. Railway Co.*, 2 Denio (N. Y.), 609, 43 Am. Dec. 758.

³⁴ *Harrington v. Gies*, 45 Mich. 374; *Strauss v. Meertlef*, 64 Ala. 299, 38 Am. Rep. 8.

of his services.³⁵ Where, however, the purpose of the agency has practically been accomplished, but the principal refuses to avail himself of the result of the services rendered, or revokes the authority before doing so, then the compensation agreed upon will measure the agent's damages.³⁶ Thus, where the owner of land, in violation of an agreement with his agent, refused to execute a deed to a purchaser, secured by the agent, the measure of damages would be the amount of the commission due under the contract of employment.³⁷ So, of course, where the principal revokes authority merely to avoid payment of commission, the agent may recover the amount of such commission, either as a proper measure of damages for breach of contract, or upon the theory that performance is complete, and the commission has been earned.³⁸

(c) **Agent's misconduct.** The agent, as we saw in the previous chapter, impliedly agrees to exercise good faith in his dealings with the principal, to obey instructions, and to perform his service with due diligence and care.³⁹ Violation by the agent of his obligations, if substantial, would entitle the principal to rescind the contract of employment without liability for damages.⁴⁰ It is sometimes stated as

³⁵ *Blackstone v. Buttermore*, 53 Pa. St. 266; *Chambers v. Seay*, 73 Ala. 372.

³⁶ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441.

³⁷ *Witherell v. Murphy*, 147 Mass. 417, 18 N. E. 215.

³⁸ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Jones v. Adler*, 34 Md. 440; *Strong v. West*, 110 Ga. 382, 35 S. E. 693. Where a broker procures an offer which is rejected—there being no obligation to accept—and the negotiations are abandoned, a subsequent sale in good faith to the person who made the offer will not create liability for the broker's commission. *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15.

³⁹ Ante, Chap. XIV.

⁴⁰ *McClay v. Hedge*, 18 Iowa, 66; *Parcell v. McComber*, 11 Neb.

the rule that where a principal terminates an agency for misconduct of the agent, the latter forfeits all claim to compensation for services rendered.⁴¹ In case of fraudulent dealings, or where misconduct has been so gross as practically to render the services valueless, this undoubtedly would be correct.⁴² It would seem, however, where the services rendered were of substantial value to the principal, and in excess of any damages sustained by reason of the agent's misconduct, that recovery could be had for the value of such services.⁴³

(d) *Revocation by law.* Where authority is revoked by operation of law, such revocation nullifies the contract of employment. Thus, where an agency is terminated by the death or insanity of the principal, the agent may recover on *quantum meruit* for services actually rendered, but is not entitled to damages for loss occasioned by the termination of his employment.⁴⁴

209, 7 N. W. 529; *Chicago, etc., Ry. Co. v. Bayfield*, 37 Mich. 205; *Dieringer v. Meyer*, 42 Wis. 311, 24 Am. Rep. 415.

⁴¹ *Sea v. Carpenter*, 16 Ohio St. 412; *Vennum v. Gregory*, 21 Iowa, 326; *Brannan v. Strauss*, 75 Ill. 234; *Porter v. Silvers*, 35 Ind. 295. Where an agent is guilty of such misconduct as amounts to treachery, or has failed to recognize the responsibilities imposed upon him, he forfeits all compensation. *Hahl v. Kellogg*, 42 Tex. Civ. App. 636, 94 S. W. 389.

⁴² *Sumner v. Reichenker*, 9 Kan. 320; *Sidway v. American Mortgage Co.*, 222 Ill. 270, 78 N. E. 561. An agent who acts, without knowledge of his principal, for both parties to the transaction can not recover compensation, regardless of whether the principal was injured or the agent intended wrong. *Lemon v. Little* 21 S. D. 628, 114 N. W. 1001. See *Atterbury v. Hopkins*, 122 Mo. App. 172, 99 S. W. 11.

⁴³ *Massey v. Taylor*, 5 Cold. (Tenn.) 447; *Lawrence v. Gullifer*, 38 Me. 532; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203.

⁴⁴ *Yerrington v. Green*, 7 R. I. 589, 84 Am. Dec. 578. But the

§ 157. **Renunciation by agent. (a) In general.** Where an agent is employed for an indefinite period, it is his right, of course, to terminate the employment at will; and upon doing so, he may recover the stipulated compensation for services rendered.⁴⁵ So, where employed for a definite term, he may have the right, under provisions of the contract, to terminate the same upon certain contingencies; and by the exercise of such right, he does not forfeit his claim to compensation.⁴⁶ And, so, though employed for a definite term, the conduct of the principal may be such as to entitle the agent to abandon the employment without forfeiture of compensation.⁴⁷ And, though there be a breach of contract, such as would entitle the principal to damages, yet the agent could recover compensation for services rendered where the contract was severable, and compensation was not expressly or impliedly conditioned upon completion of the term of service, or upon full performance of an undertaking.⁴⁸

(b) Entire and severable contracts. It is the general rule that where a contract of employment is entire, or compensation is contingent upon full performance, wrongful renunciation, or abandonment, of the employment by an agent not only creates liability for breach of contract, but forfeits all claim to compensation for services rendered.⁴⁹

fact that the principal became bankrupt would not relieve him from liability. *Lewis v. Atlas Ins. Co.*, 61 Mo. 534.

⁴⁵ *Franklin Mining Co. v. Harris*, 24 Mich. 115; *Patterson v. Suffolk Mfg. Co.*, 106 Mass. 56.

⁴⁶ *Winship v. Base Ball Ass'n*, 78 Me. 571; *Spring v. Ansonia Clock Co.*, 24 Hun (N. Y.), 175; *Provost v. Harwood*, 29 Vt. 219.

⁴⁷ *Patterson v. Gage*, 23 Vt. 558, 56 Am. Dec. 96; *Warner v. Smith*, 8 Conn. 14; *Bishop v. Ranney*, 59 Vt. 316, 7 Atl. 820.

⁴⁸ Post § 157 (b).

⁴⁹ *Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638; *Thrift v.*

Thus, in an early Massachusetts case, where a man was employed to serve another for one year, for a stated sum, it was held that abandonment of the employment, before the expiration of the year, defeated his right to compensation for services rendered.⁵⁰ Said the court: "The performance of a year's service was in this case a condition precedent to the obligation of payment. The plaintiff must perform the condition before he is entitled to recover anything under the contract; and he has no right to renounce his agreement and recover upon a *quantum meruit*. The law will not admit of the monstrous absurdity that a man may voluntarily and without cause violate his agreement, and make the very breach of that agreement the foundation of an action which he could not maintain under it."⁵¹ So, generally, where a man agrees to perform a particular undertaking for a fixed compensation, failure to complete performance will defeat a claim for any compensation.⁵²

The rule, of course, does not apply where the contract is construed to be severable, as where different items of service are to be separately remunerated, or compensation is to be paid in fixed instalments.⁵³ And in a number of states the rule has been so far modified as to permit of recovery upon *quantum meruit*, where the services rendered have

Payne, 71 Ill. 408; *Peterson v. Mayer*, 46 Minn. 468, 49 N. W. 245; *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621.

⁵⁰ *Stark v. Parker*, 2 Pick. (Mass.) 267, 13 Am. Dec. 425.

⁵¹ *Stark v. Parker*, *supra*.

⁵² *Reab v. Moor*, 19 Johns. (N. Y.) 337; *Davis v. Maxwell*, 12 Metc. (Mass.) 286; *Hansell v. Erickson*, 28 Ill. 257; *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621.

⁵³ *Capron v. Strout*, 11 Nev. 304; *Thayer v. Wadworth*, 19 Pick. (Mass.) 349. A contract with a teacher to teach ten months at a given sum per month has been held entire. *Wilson v. Board of Education*, 63 Mo. 137. See *Reab v. Moor*, 19 Johns. (N. Y.) 337.

been of distinct benefit to the principal, and their value to him is not dependent upon completion of the contract.⁵⁴ Said the court in an early New Hampshire case: "Where a party contracts to perform certain work and to furnish materials, as for instance to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials he is bound to pay so much as they are reasonably worth. The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, and with knowledge also that the other party may eventually fail of completing the entire term. If under such circumstances, he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract."⁵⁵

§ 158. Obligation to reimburse. An agent is entitled to reimbursement for such expenses incurred as were reasonably necessary for proper performance of the agency and which, therefore, must have been in contemplation by the principal when he made the appointment.⁵⁶ The right

⁵⁴ *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Allen v. McKibben*, 5 Mich. 449; *McClay v. Hedge*, 18 Iowa, 66; *Parcell v. McComber*, 11 Neb. 209, 7 N. W. 529; *Duncan v. Baker*, 21 Kan. 99.

⁵⁵ *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

⁵⁶ *Bibb v. Allen*, 149 U. S. 481; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Searing v. Butler*, 69 Ill. 575; *Beach v. Branch*, 57 Ga. 362.

to reimbursement grows out of the agent's implied authority to do what is reasonably necessary in furtherance of the agency, which, in turn, implies a promise by the principal to bear the necessary expense of such proper performance.⁵⁷ So, even in cases where compensation is conditioned on complete performance, and employment is at will of the principal, the agent may claim reimbursement for contemplated expenditures made before revocation of his authority.⁵⁸ An agent is not entitled to reimbursement for expenditure neither expressly or impliedly authorized.⁵⁹ Nor could he recover for expenses necessitated by his own negligence, or failure, in any manner, to properly perform his duties.⁶⁰

§ 159. **Obligation to indemnify. (a) In general.** If in the due execution of his authority, and through no fault of his own, an agent sustains personal loss, or incurs personal liability, the law implies an obligation in the principal to indemnify him for the loss sustained.⁶¹ Thus, where an agent, without knowledge of the fact, sold cotton for his principal, which had been falsely packed, and was forced to refund the purchase price, he could recover from the principal the amount so refunded;⁶² and where an agent, who purchased property for his principal, was sued and compelled to pay the purchase price, he could recover the

⁵⁷ *Bibb v. Allen*, 149 U. S. 481.

⁵⁸ *Chambers v. Seay*, 73 Ala. 372; *Urquhart v. Mortgage Co.*, 85 Minn. 69, 88 N. W. 264.

⁵⁹ *Keyes v. Westford*, 17 Pick. (Mass.) 273.

⁶⁰ *Brown v. Clayton*, 12 Ga. 574; *Godman v. Meixel*, 65 Ind. 32; *Maitland v. Martin*, 86 Pa. St. 120.

⁶¹ *Powell v. Trustees*, 19 Johns. (N. Y.) 284; *Denny v. Wheelwright*, 60 Miss. 733; *Saveland v. Green*, 36 Wis. 612.

⁶² *Beach v. Branch*, 57 Ga. 362.

amount so paid, together with the costs to which he had been put.⁶³ So, where an agent under direction of his principal innocently commits a trespass, or sells goods belonging to a stranger, he is entitled to indemnity for the liability incurred.⁶⁴ And where an agent authorized to make a contract for his principal, executes the same in his own name, and becomes personally liable in damages because the principal fails to perform, recovery against the principal, by way of indemnity, may be had.⁶⁵

(b) **Illegal acts.** As we saw in an early chapter, an agent can not recover compensation, nor in any way enforce the contract of employment, where the purpose of the agency is unlawful.⁶⁶ This same principle applies in determining the right to indemnity, which necessarily is based upon express or implied agreement between the parties. There can be no contribution between wrongdoers. Hence, where an agent incurs liability by knowingly performing an illegal act, such as selling liquor contrary to statute, he can not claim indemnity against the principal; nor enforce an express obligation intended to secure the same.⁶⁷ So, where an agent knowingly commits a trespass,

⁶³ *Clark v. Jones*, 16 Lea (Tenn.), 351.

⁶⁴ *Moore v. Appleton*, 26 Ala. 633; *Drummond v. Humphreys*, 39 Me. 347; *Castle v. Noyes*, 14 N. Y. 329; *Nelson v. Cook*, 17 Ill. 443. Where a railway conductor incurs liability by ejecting a passenger, in pursuance of instructions, for failure to produce such a ticket as the conductor was directed to require, indemnity could be had against the company. *Howe v. Railway Co.*, 37 N. Y. 297.

⁶⁵ *Saveland v. Green*, 36 Wis. 612; *Greene v. Goddard*, 9 Metc. (Mass.) 212.

⁶⁶ Ante § 38.

⁶⁷ *Bixby v. Moor*, 51 N. H. 402; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376. If from lack of knowledge of facts, the agent does not know that the act is illegal, then he may re-

or sells goods for his principal, with knowledge of an adverse title, his voluntary participation in the wrongdoing defeats his claim for indemnity.⁶⁸

§ 160. **Lien of agent.** Liens, in modern times, have become quite generally a subject of legislative enactment. There still subsists, however, a number of common law liens, and among them the lien of an agent. A lien, at law, is the right to retain possession of the goods of another to secure payment of a debt due from the owner. A simple example of a lien is the right of an innkeeper to retain possession of the baggage of a guest to secure payment of board. A lien is either general or special. A right to retain any or all goods in possession to secure a general debt or balance due from the owner would be a general lien. A right to retain merely such property as is affected by the demand, or out of dealings with which the claim arises, is called a special or particular lien.

Factors, bankers and attorneys have, at common law, a general lien. Thus a factor may retain all goods of his principal in his possession, and the proceeds of such as have been sold, to secure a general balance due him.⁶⁹ So, a banker may retain all securities deposited by a customer;⁷⁰ and, an attorney has a general lien upon all docu-

cover, though, in fact, it was illegal. *Irwin v. Williar*, 110 U. S. 499; *Bibb v. Allen*, 149 U. S. 498.

⁶⁸ *Drummond v. Humphreys*, 39 Me. 347; *Moore v. Appleton*, 26 Ala. 633; *Mohr v. Miessen*, 47 Minn. 228, 49 N. W. 862.

⁶⁹ *Knapp v. Alvord*, 10 Paige (N. Y.), 205, 40 Am. Dec. 241; *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522; *McGraft v. Rugee*, 60 Wis. 406, 19 N. W. 530; *Johnson v. Clark*, 20 Ind. App. 247, 50 N. E. 762.

⁷⁰ *Swift v. Tyson*, 16 Pet. (U. S.) 1.

ments, and other chattels, which came into his possession in his professional capacity.⁷¹

§ 161. **Special liens.** (a) **In general.** Except in the cases cited, an agent has merely a special or particular lien upon the goods of his principal.⁷² Thus, an agent who purchased goods for his principal, and took possession, would have a lien on them for his commission, but could not retain them to secure an independent debt, such as commissions earned in another transaction.⁷³ So, a broker employed to make a sale, or to secure a loan, would have a lien for his commission upon such proceeds of the sale, or loan, as came into his possession in his capacity as agent.⁷⁴ And where an agent obtains possession of goods from a carrier by paying freight due upon them, he would have a lien upon the particular goods to secure reimbursement.⁷⁵

(b) **Requisites of lien.** A lien will attach only to such goods of the principal as come lawfully into possession of the agent in his capacity as agent;⁷⁶ and will not take

⁷¹ *McPherson v. Cox*, 96 U. S. 404; *Bowling Green Bank v. Todd*, 52 N. Y. 489; *Hurlbert v. Brigham*, 56 Vt. 368.

⁷² *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Vinton v. Baldwin*, 95 Ind. 433. The lien of an agent employed for a particular transaction is ordinarily a particular lien, and is confined to retention of the property for services and disbursements in reference to that property only. *Mechem on Agency*, § 685.

⁷³ *Allen v. Megguire*, 15 Mass. 496; *Scott v. Jester*, 13 Ark. 438; *Adams v. Clark*, 9 Cush. (Mass.) 215.

⁷⁴ *Vinton v. Baldwin*, 95 Ind. 433.

⁷⁵ *White v. Railway Co.*, 90 Ala. 254, 7 South. 910. An agent has a right to a lien for his commissions, advances and services in and about the property or thing intrusted to his agency when they are proper, necessary or incident thereto. *Grauman v. Reese*, 13 Ky. Law Rep. 683.

⁷⁶ *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467; *Collins v. Buck*, 63 Me. 459; *Sawyer v. Lorillard*, 48 Ala. 332; *Elliott v.*

precedence over existing claims of third persons.⁷⁷ The possession must be continuous, and hence a voluntary surrender of the property will terminate the lien, which will not reattach upon recovery of possession.⁷⁸ So, a lien will not attach if it be inconsistent with the terms upon which possession is secured.⁷⁹ Thus, where an agent is authorized to sell goods and to pay a debt with the proceeds of sale, a lien would not attach to such proceeds.⁸⁰ So, generally, an agent may forego his lien by agreement, or waive the same by accepting other security.⁸¹

(c) **Enforcement of lien.** In the absence of statute, a lien can not be enforced by summary sale of the property.⁸² It is a mere right to possession, which may be set up by way of defense in an action by the owner to recover. To realize upon a lien, judgment must be secured, upon which execution can issue against the property; or a decree of sale must be obtained from a court of equity.⁸³ An excep-

Bradley, 23 Vt. 217. Where an agent incurs liability upon faith of the solvency of his principal, and the latter becomes insolvent before the proceeds of such liability have come into his actual possession, and while they are yet in reach of the agent, the latter has a lien upon them for his protection and indemnity. *Muller v. Pondix*, 55 N. Y. 325, 14 Am. Rep. 259.

⁷⁷ *Bryce v. Brooks*, 26 Wend. (N. Y.) 374.

⁷⁸ *Robinson v. Larrabee*, 63 Me. 116; *Nash v. Mosher*, 19 Wend. (N. Y.) 431; *Nevan v. Roup*, 8 Iowa, 207; *Rosenbaum v. Hayes*, 8 N. D. 461, 79 N. W. 987.

⁷⁹ *Gilman v. Brown*, 1 Mason (U. S.), 191, Fed. Cas. No. 5,441. *Haebler v. Luttgen*, 61 Minn. 315, 63 N. W. 720.

⁸⁰ *Jarvis v. Rogers*, 15 Mass. 389.

⁸¹ *Chandler v. Belden*, 18 Johns. (N. Y.) 157; *Sawyer v. Lorillard*, 48 Ala. 332; *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Dec. 634; *Story v. Flournoy*, 55 Ga. 56; *Jones on Liens*, § 1011.

⁸² *Jones on Liens*, § 1018.

⁸³ *Fox v. McGregor*, 11 Barb. (N. Y.) 41; *Balley v. Shaw*, 24 N. H. 297, 55 Am. Dec. 241; *Story on Agency*, § 371.

tion exists in favor of factors, who have made advances upon goods in their possession;⁸⁴ and so, in the case of a bailment or pledge, the bailee, after demand and notice, may usually enforce his lien by a sale of the property.⁸⁵

§ 162. **Stoppage in transitu.** Where an agent purchases goods with his own funds, or upon his individual credit, and consigns them to his principal, the relation between the parties is so analogous to that of unpaid vendor and purchaser, that the law permits the agent to exercise the right of a vendor, and to stop the goods in transit, if the principal becomes insolvent.⁸⁶ The exercise by an agent of the right of stoppage *in transitu* would, of course, be subject to the same rules and limitations as are applicable in cases of the exercise of the right by other vendors.⁸⁷

⁸⁴ *Hilton v. Vanderbilt*, 82 N. Y. 591; *Frothingham v. Everton*, 12 N. H. 239; *Walker Co. v. Produce Co.*, 113 Iowa, 428, 85 N. W. 614.

⁸⁵ *Parker v. Brancker*, 22 Pick. (Mass.) 40.

⁸⁶ *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Seymour v. Newton*, 105 Mass. 272; *Farmers', etc., Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 813.

⁸⁷ *Benjamin on Sales*, § 829.

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